REGISTERED No. D. 221

The Gazette of India

EXTRAORDINARY

Part II—Section 3

PUBLISHED BY AUTHORITY

No 173] NEW DELHI, FRIDAY, DECEMBER 19, 1952

ELECTION COMMISSION, INDIA

NOTIFICATION

New Delhi, the 19th December 1952

S.R.O. 2078.—WHEREAS the election of Shri Gauri Sankar Bhattacharya of Ujanbazar, Gauhati Town, Assam, as a member of the Assam Legislative Assembly from the Gauhati constituency of that Assembly, has been called in question by an Election Petition duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951), by Shri Keshab Chandra Patwari, of Rehabari, P.O. Gauhati, Mauza Panbari, Kamrup District, Assam;

AND WHEREAS the Tribunal appointed by the Election Commission in pursuance of the provisions of Section 86 of the said Act for the trial of the said Election Petition has, in pursuance of the provisions contained in Section 103 of the said Act, sent a copy of its order to the Commission;

NOW, THEREFORE, in pursuance of the provisions of section 106 of the said Act the Election Commission hereby publishes the said Order of the Tribunal.

ELECTION PETITION No. 149 OF 1952

PRESENT:—Shri Ashutosh Das, Retd, District Judge, (W. Bengal).—*Chairman.*

Shri Umakanta Gohain, Retd. Addl. Judge (Assam),
Shri U. N. Bezbaruah, Barrister-at-Law, Gauhati. } Members of the Election Tribunal, Assam.

Dated the 10th December, 1952

In the matter of an election-petition under Section 81 of the Representation of the People Act, 1951;

And

In the matter of an order passed by the Returning Officer, rejecting the nomination-paper presented by the Petitioner, on 26th November, 1951, under Section 33(I) of the Representation of the People Act, 1951.

Keshab Chandra Patwari.—*Petitioner.*

versus

1. Gauri Sankar Bhattacharya,
2. Raj Bala Das,
3. Jagadis Chandra Medhi,
4. Sachindra Binode Sen,
5. Hem Kanta Barua,
6. Dhireswar Kalita &
7. Hareswar Goswami.—*Respondents.*

Petitioner—represented by

(1) Shri S. Lahiri, Advocate-General & others.

Respondent No. 1.—represented by

(1) Shri S. K. Ghose, Advocate, assisted by

(2) Shri K. Goswami, Advocate.

JUDGMENT

The petition relates to election of a Member to the Assam Legislative Assembly, for the Gauhati Constituency. The respondent No. 1, Shri Gauri Sankar Bhattacharya is the returned candidate. The petitioner, Keshab Chandra Patwari challenges the election as wholly void on the ground that the nomination-paper, filed by him was improperly rejected by the Returning Officer. It may at once be noted here that the petitioner did not, in his election-petition, plead that the result of the election had, in fact, been materially affected by reason of the above improper rejection of his nomination, and an issue has been raised on this score on behalf of the respondent.

The order of the Returning Officer, rejecting the nomination-paper of the petitioner, runs as follows:—

"Objection to nomination raised U/s 7(d) of the R. P. Act 1951. In this connection read relevant report of Ex. Engineer, L.A.D., Gauhati, (No. 16617, dated 30th November 1951), which indicates that the applicant's contract with the Government for execution of work in the Water Works is not yet complete. The final bill for the work is admitted to be under preparation and payment by Government has still to be made to this applicant. The objection therefore appears to me to be substantial enough to warrant rejection of this candidate's nomination-paper."

The petitioner contends that this is a case of improper rejection of his nomination, and with regard to the reason given by the Returning Officer in rejecting his nomination, it is contended on his behalf that he had, indeed, completed the work under the contract, referred to, long before the nomination-paper was filed, and the fact, that payment for the work had not yet been made by the Government, would not bring the case within the mischief of Section 7(d). There were other points of contention, raised on his behalf to which we shall refer presently.

It is further an admitted fact that the election-petition, which was addressed to the Election Commission by the petitioner, reached the Commission by post on 17th April, 1952, and that there was delay of 8 days, beyond the prescribed period of limitation for presenting it. Before the Commission, the question for the delay, as put forward by the petitioner, was that he had been suffering from typhoid from the 20th of March to the 14th of April, and in support of this, a medical certificate was furnished. The Commission accepted this explanation of the petitioner, and condoned the delay. The respondent No. 1, the returned candidate, has alone contested the application, though written-statements were filed by three more respondents, respondent No. 4 supporting the case of the petitioner, respondent No. 6 challenging it, and the respondent No. 7 only pleading that as he had withdrawn his nomination on the date fixed for the same, he was unnecessarily impleaded in the election-petition.

Issues framed, in the case, are the following:

1. Is there a sufficient ground for condoning the delay made by the petitioner in presenting the election-petition to the Election Commission?
2. Is the Tribunal entitled under law to enter in the above question of limitation, in view of the above order of the Election Commission on the point?
3. Was the nomination of the petitioner improperly rejected? If so, has the result of the election been materially affected thereby?
4. Is the election-petition liable to be rejected in absence of specific allegation of the election having been materially affected by reason of rejection of the aforesaid nomination?
5. Was the petitioner really disqualified under Section 7(d) of the R. P. Act, 1951, to stand as a candidate as held by the Returning Officer?

JUDGMENT

Issue No. 2

It was contended on behalf of the petitioner that in view of the Election Commission having condoned the delay in presenting the election-petition, under proviso to Section 85 of the R.P. Act, 1951, it is not within the competence of the Tribunal to enter into the question of limitation again. This contention is untenable.

in view of the express provision contained in Clause (4) of Section 90 of the Act, which makes a clear statutory provision enabling the Tribunal to consider the question again. Apparently, in making such a provision in the above Clause, the Legislature had, in view that the Commission would ordinarily make such order condoning the delay *ex-parte*, and without the other interested party or parties, being given an opportunity to question the explanation of the delay that may have been offered by the petitioner to the Commission at the time of presenting it, and so, a statutory provision was made to safe-guard the interest of the other party, by giving it an opportunity to convass the matter again fully before the Tribunal. In fact, a change in the law has been made now, the former provision of the law being that the Governor, having once condoned such delay or other kinds of preliminary irregularities, the matter could not be agitated later before the Tribunal. From this above change, in the law, the intention of the Legislature, as above, may clearly be gathered. The issue is, therefore, answered against the petitioner, and we are unanimous in this

Issue No. 1

With regard to our decision on this issue, we have not been able to come to an agreement the view taken by me on the evidence on the point, having been different from the one taken by my two Colleagues on the Tribunal, and, I proceed to record here my own view of the same. The view taken by the two Members of the Tribunal shall be expressed in a separate judgment at the end.

About the principles that should guide us in apprising the evidence on this issue, I would refer to the cases, reported in:—

(1) 17. C.L.J. 596, and

(2) 22. C.W.N. 481, (P.C.).

The principle, as enunciated in the former case, comes to this that when a Court proceeds to condone the delay in filing an appeal within the statutory period and that under Section 5 of the Indian Limitation Act, it must be "fully" satisfied of the "justice of the grounds" on which it is sought to obtain an extension of time, by which the successful litigant may have been deprived of a valuable right and advantage, already accrued to him under the law, by reason of efflux of time. The principle enunciated applies with all force here. In the case, reported in 22. C.W.N. 481, it was further laid down that in such a case as this, a heavy burden of proof rests on the party asking for this concession, of furnishing evidence of a distinct and unquestionable character in proof of the grouds, taken for such condonation.

The petitioner has here alleged his illness that prevented him from presenting the petition in time. Besides considering whether he was really ill, we have here further to find that he had been so much ill that it could not have been possible for him to manage the business of presenting the petition within the statutory period, without personally attending to the same. In other words, we are to be fully satisfied not only about his plea of illness, but also about the seriousness of it, so as to condone the delay.

On a consideration of the evidence on record, I take the view that the petitioner has failed to discharge this heavy onus that rested on him, and that, on either of the points noted above, and from the evidence, it cannot, at any rate, be found that the petitioner has been able to put his case beyond reasonable doubt.

The only evidence furnished by the petitioner, is the oral testimony of himself and a Doctor, (P.W. 2), and a medical certificate that was granted by the latter, on 15th April, 1952, marked Ext. 2. The respondent has furnished some evidence in disproof of the petitioner's plea of illness, and to show that, during the period he is alleged to have been ill, he had, in fact, been attending to his normal activities A neighbour of the petitioner (O P.W. Nirghuni) is also examined by the respondent to disprove the petitioner's plea of illness.

I would first refer to the evidence, furnished by the respondent on the point, and discuss how far, if at all, that may go to discredit the petitioner's plea, or, at any rate, through a reasonable doubt on the same.

The respondent first comes with the evidence that on 24th March, 1952, the petitioner was found (1) attending a Criminal Court at Gauhati in connection with his case against one, Giridhar Saikia, in which admittedly O.P.W. 1, Shri Golakeswar Goswami, an Advocate, had been engaged by him, (2) again, found attending the measurement of his work in connection with the Gauhati Water Works by Shri Lawkar, S.D.O. (P. W. D), as is said to have been shown by the note in the measurement-book (Ext. A.1), which again is said to have been made by the

aforesaid P.W.D. Officer, and endorsed by the petitioner with his signature, under the same date, namely, 24th March, 1952.

With regard to the first piece of the above evidence, it is proved by the Advocate Goswami that he filled the petition, marked Ext. E. on the date, and that under instructions received from the petitioner himself, which he used always to get in the Court. There is nothing in the petition itself to show that the petitioner was personally present in the Court on the day, and, further, it is shown by this document that some papers which had been called for at the instance of this petitioner from some Government Office more than once before this, had not yet been received in the Court from that Office, and in the petition, it was prayed that the documents might be called for again. Even without any further instruction from his client, the Advocate might have made this petition on the day, as he had already instructions from his client to call for them and apparently the Lawyer must have felt the necessity for production of the documents. I cannot, therefore, rely on the above evidence of the witness to prove that the petitioner was personally present in the Court on the day, the statement of the witness to the effect, being really one of an inferential nature.

Then, with regard to the evidence of the note in the measurement-book (Ext. A.1), the petitioner's sworn statement was that he was not really present when the measurement above noted was made, and that his signature to this note was really taken about the 20th or 22nd April, *i.e.*, about a month after, with a back date, and this for the purpose of getting the note of measurement, already entered in the book, endorsed by the petitioner, as the contractor. The petitioner adds that signatures to such notes of measurement in the measurement-book are often taken from the contractors with back dates, though he did not cite any other specific instance of a signature with a back date having thus been taken from him. Notwithstanding this, however, when there is no more evidence than what is apparently furnished by the note itself, as against the above sworn statement of the petitioner, to prove that the petitioner was actually present on 24th March, 1952, when the measurement of the work is said to have been taken up by the S.D.O. Lawker, I cannot rely on the evidence of the above note in the book only. It may be noted in this connection that the evidence is that the same S.D.O. is yet posted at Gauhati and the respondent might easily produce him as a witness to prove his case on the point, which has not been done.

Next, I come to another date, namely, 10th April, 1952, when also the petitioner is said to have attended the Court in connection with his Criminal Case, referred to above. Ext. C is a hazira (intimation of attendance of witness) put in evidence by the respondent, in this connection. Here, only the signature of the Pleader, who is admitted to have been engaged by the petitioner in the above case also, is proved. The proof is really not sufficient in law to prove the contents of the document. One Tarini, a Pleader's clerk, purports to have written out the document. He is not produced as a witness by the respondent though he was cited by him and summoned. Of course, the petitioner's statement of his name, having been entered in the document falsely with a view to create evidence against him, does not stand to reason. By his above statement, he apparently meant that this had been done to create evidence against him for the present case, which is absurd, as the election-petition had not yet then been presented. When however nobody comes to prove the contents of the document formally, and also to prove the fact that the petitioner actually attended the Court on the day, the circumstances that it was not likely that if the petitioner had really been ill on the day, as alleged, his name should have been entered falsely in the hazira turns out to be of no consequence.

About the evidence of Nirghuni, witness for the respondent, his statements that he is the next-door neighbour of the petitioner, and that he used to draw his water from the house of the petitioner, stand unchallenged. I do not find any apparent reason to discredit his sworn testimony which disproves that the petitioner had been ill at the time.

Apart from the above evidence of the respondent, I proceed to consider the evidence, furnished by the petitioner himself, to judge if the same is of a character, upon which we can fully rely. I have already referred to the evidence that had been actually furnished by the petitioner on the point.

With regard to this evidence, one circumstance, which has carried considerable weight with me in throwing a reasonable doubt about the truth of the petitioner's plea, is this. In para. 11 of his election-petition, the petitioner clearly states that he was bed-ridden up to 14th April, 1952. The statement of the medical certificate (Ext. 2) is also that the petitioner continued to be under the treatment of the Doctor till the same day, and that, during the period the petitioner had been under

his treatment, he was advised to take complete rest in bed. Nay, the Doctor went further, in his deposition, to state that even after the period of his convalescance which followed the remission of his fever, the period of convalescence, according to the Doctor's evidence, appearing to extend till the end of the period of his treating him, which was 14th April, 1952, the Doctor advised the patient rest for another 3 weeks. I refer to this statement of the Doctor to show an apparent solicitousness on his part to over-colour the nature of the alleged illness, and I would presently refer to some more evidence of the Doctor which betrays the same anxiety on his part. Now, the circumstance that I propose to refer to here is that on 15th April 1952, the petitioner appears to have busied himself extensively in connection with his preparations for presenting the election-petition, and is found to have moved about briskly from place to place for the purpose. He takes the medical certificate from the Doctor, goes to the Deputy Commissioner's Office, applies for a copy of the Returning Officer's order of rejection of his nomination, obtains delivery of the copy on the same day, makes deposit of the security money in the Treasury, and, lastly, even in the night, he goes to a lawyer's house to get the election-petition drawn up, which was made ready fully on the next day and posted. The petitioner's actual case is that he was bed-ridden up to the 14th April, and he has to be pinned down to this statement of his case, and we would not be justified in taking a lenient view and say that this might really have been an over-statement. In order to judge whether the petitioner has succeeded in proving the reason of his delay satisfactorily, we have to consider his case taken on the point as a whole, and not piece-meal. Now, it appears to me really doubtfull that the petitioner being bed-ridden up to 14th April, could move about so briskly about this business on the very next day, and the consideration of this circumstance alone goes to my mind to throw a real doubt about the truth of the petitioner's plea, as taken before us. In para. 5 of his written-statement, the respondent specifically pleaded that the petitioner was not, in fact, ill at the time, or at any time, near about it. That he was quite in good health at the time and had been attending to his normal activities. That the medical certificate furnished by him was a false one and procured with a purpose. Notwithstanding these specific statements of the respondent in his written-statement, the petitioner comes here with no more evidence than the oral testimony of himself and the Doctor granting him the certificate and the certificate itself. The petitioner did not take the care to enquire wherefrom his medicine was brought, nor any attempt was made by him to produce the prescriptions that may have been made by the Doctor, in original, nor copies of the same from the Pharmacy where the same may have been served were furnished. The petitioner even goes to state in his deposition that he was not in a position to say wherefrom his medicines were then brought adding that his brother could say this. The brother is not produced as a witness. No neighbour was called in to prove the illness, though it was only probable that in case of illness of the nature alleged, the same would have come to the notice of some or other neighbour, or other persons who may have been usually in contact with the petitioner. No such witness is brought to bear out the petitioner's plea.

To come to the Doctor's evidence, I would observe generally that I am not at all impressed by the same, and I am unable to rely on it. As already noticed, in the election-petition, the petitioner only stated that he had been suffering from high fever. In the certificate that the Doctor granted him, he described it as a case of typhoid fever and I bear a reasonable suspicion of this having been done with a purpose, namely, to give the alleged illness also a colour of seriousness, which might have been considered necessary with a view to afford a sufficient justification for the delay in presenting the petition, and to show that there was really no remissness on the part of the petitioner. About the nature of illness, we get it from the petitioner himself that he ran temperature for 10 days only, and according, to the Doctors evidence [illegible] he ever had, went up to about 102 degrees. That he had no other complication except that there was pain all over his body and the patient had developed tympanites. There was no clinical examination of the case. Inspite of all this, the Doctor would say that after watching the patient for 3 or 4 days only, he diagnosed it to have been a case of typhoid. He further says that he had advised the patient to keep a chart of the rise and fall of the temperature, but then he would add that he was unable to state that if such a chart was kept, which meant that he had never the occasion to refer to such a chart for the purpose of his above diagnosis. He was a Doctor living at a distance of about 1½ miles from the house of the petitioner. He was not the family physician of the petitioner and had never before been called to treat any other member of the petitioner's family, though he states that on 2 or 3 more occasions, he had been called by the petitioner to attend on the servants and labourers under him. The Doctor states also that the petitioner had no more physicians attending him during this illness, and yet, he only attended him on 3 or 4 days, during the period of about 25 days he had been under his treatment, though, according to his diagnosis, it was a case of typhoid, and, according to the petitioner, the

temperature alone ran for 10 days, and over a week according to the Doctor, since he took up the treatment. On a consideration of all these above facts and circumstances, I observe that definitely I am not impressed with the evidence of the Doctor. So, with the evidence of the petitioner himself.

Lastly, it would not suffice for the petitioner merely to prove that he was ill at the time. He is further to satisfy us that he had been so ill that it was not possible for him to take the necessary steps for the presentation of the petition within the statutory period. That there was, in fact, no remissness or want of diligence on his part. On this point too, I am not satisfied from the evidence. It really appears from the evidence of the petitioner himself that there were no serious complications in the case so as to disable him from taking the necessary action in the matter in time, with the assistance of others. His elder brother Gagan Ch. Patwari was a man of business, being also a P.W.D. contractor and a man of education—both of which facts are admitted by the petitioner himself. It is also admitted that he was living in the same house with the petitioner, though the petitioner would add that it was only, in the same compound. It is further admitted that the brother was calling the Doctor and getting medicines for the petitioner, during his illness. Questioned on the point, the petitioner says that his brother was not interested in this matter of election and did not suggest to him during his illness, that he might himself get the election-petition drawn up. It is not a question of his brother having made such a suggestion to him, but whether the petitioner could ask his brother to take this action on his behalf during his alleged illness. In the state of evidence, as has been furnished, it cannot be found that the petitioner was mentally unfit or disabled to do so. The petitioner had his employees also, one of whom was named by him, namely, Haren Kalita. In this state of evidence, it appears to me thus that the petitioner has also failed to satisfy us on the point that there was no want of diligence on his part.

It was next argued on the part of the petitioner, that his whole previous conduct would show that he was keen about his election. He had taken steps to give up his contract under the P.W.D. in order to remove his disqualification. After rejection of his nomination, he moves the Hon'ble High Court for remedy. But all these had been done some months before, and there is nothing improbable in that after the High Court had rejected the application of the petitioner along with other similar applications made by other persons, the petitioner gave up the idea of pursuing the matter further, and then there is further no inherent improbability in his changing his mind again in the matter just about the time of his presenting the election-petition, and now that, he had taken this decision too late, he had to come with a false excuse to have the delay condoned. So, I am unable to rely upon the above previous conduct of the petitioner, so as to render his above evidence in support of his plea of illness, one on which I may unhesitatingly count.

For the above reason, I answer the issue No. 1 against the the petitioner.

Issues Nos. 3 to 5

In All these issues we have been unanimous in our decision.

First, to refer to the contracts alleged to have been held by the petitioner under the appropriate Government, there are, in fact, only two such contracts, upon which the respondent relies, in support of his plea of disqualification, the first of which is one relating to the refugee market and the second, as related to the work, in connection with the Gauhati Water Works.

To take up the first of the alleged contract, namely, the one referring to the refugee market, the petitioner's statement is that the only work of contract he had in his hand about the time of the nomination was this one and he had decided to give up the work, as he had intended to stand as a candidate for the election. Accordingly, he asked the Chief Engineer, Assam, to release him from the contract, which the Chief Engineer did. The petitioner, of course, states, in his deposition that he cannot give the exact date on which the contract was thus cancelled by the Chief Engineer, but he adds that this was done before the date of his nomination. He further states that he had practically done no work in conection with the contract and so, there was no account to be settled for this. On 30th November 1952, at the request of the Returning Officer, P.W.1 Shri Kamaleswar Baruah, who was then the Executive Engineer at Gauhati, reported that the petitioner's contract for this work had indeed stood cancelled at the time. The witness further states that at the request of the petitioner his name was also removed at the time from the list of the scheduled contractors of the P.W.D. and he adds that this had been done on 23rd November 1952. i.e., a few days before the nomination. So, it is only likely that the petitioner had asked for the cancellation of his contract in respect of the refugee market at the same time and this had also been cancelled at this same time, and before the back of nomination, as sworn too by the petitioner. We

accordingly accept the petitioner's own oral testimony on the point, and hold that this contract was not subsisting on the date of nomination.

On behalf of the respondent, the fortnightly progress report of the work of the refugee market for the period ending the 31st December, 1951, was put in and marked (Ext. F.) The document does not, in fact, furnish the evidence that the petitioner was still carrying on his work of the refugee market. Indeed, we find a note appearing in this document itself to the effect that the petitioner's contract for this work had already been cancelled and a fresh tender for the work had already been called for. The document therefore does not detract from the value of the testimony of the petitioner himself, and it is thus of no assistance to the respondent.

The only other work relied upon by the respondent, in going to disqualify the petitioner as under Section 7(d), is the one undertaken by him, in connection with the Water Works of the Gauhati Municipality. We find it from the relevant Gazette Notifications, which were produced before us that the Municipal Board of Gauhati Municipality had been superseded by the Government as far back as in 1947, and this supersession extended under different Notifications, up to 31st March, 1952. We find it from the deposition of the petitioner that he had taken contract for some works, in connection with the Water Works of the Gauhati Municipality in 1948, i.e., during the above period of supersession, and he completed his work in 1950. From these above facts, it was first urged on behalf of the petitioner that he having fully performed his part of the contract long before the time of nomination and there having been no further obligation left to be fulfilled by him in respect of his work at the time of nomination, he cannot be hit by the provision of Section 7(d). It was secondly urged that as the above work was not one undertaken by the appropriate Government, namely, the Government of Assam *per se*, on its own account, but only on behalf of the Gauhati Municipality, the case does not fall within the mischief of Section 7(d).

Upon the first point, as above, it is to be observed at the outset that the onus was on the respondent to prove that the petitioner did really fall under the disqualification, and that at the time of the nomination, the contract in question was, in fact, subsisting in law. We find that the respondent has failed to discharge this onus. As already referred to, the petitioner states, in his deposition, that he had completed the work as far back as in 1950. His above evidence finds some corroboration in the deposition of P.W. 1, Shri Kamaleswar Baruah, who was then the Executive Engineer of the Lower Assam Division, in charge of the work, in connection with the Gauhati Water Works. He states that he had joined this office at Gauhati in September, 1950; that since then the petitioner had done no work of the Water Works, and, further, that the petitioner had completed this work long ago. We, therefore, accept the petitioner's case that he had completed this work some time in 1950. On behalf of the respondent, a supplementary tender, in connection with this work, which had been submitted by the petitioner on 14th June 1951, and accepted by the Government on 22nd October 1951, has been put in evidence (Ext. B). This tender was not really for any fresh work to be done, but, as explained by the P.W. 4, who is the present Executive Engineer at Gauhati, this was taken in the following circumstance. According to the terms of the original tender, brick work of the first class had to be done for the construction and the first-class rate for the work had been entered in the original tender and accepted. But when the work was thereafter checked, it was found that really a second-class brick-work had been done instead, and there arose a controversy about the rates to be paid to the contractor, for this work. It was agreed that the rate of the original tender should be revised and a fresh rate for the work, as entered in this supplementary tender, would be paid, and in order to pin the party down to this rate, the supplementary tender revising the previous rate, was obtained from him. We find no reason to discard this explanation of the document, as given by P.W. 4. So, this document is of no assistance to the respondent.

It having thus been found that the petitioner had long before completed the work, the question now arises how his position stood under law, on the date of nomination, in so far as the provision contained in Section 7(d) is concerned. Our view on the point is that though the contract had originally been of the nature of what is known as an executory contract, the petitioner having already completed the work and having thus fully performed his part under the contract, this came to be an executed contract before the date of nomination so far as the petitioner was concerned. In fact, there appears to have been left no other obligation to be performed by him under the contract. It now only remained for the P.W.D. to check his work and settle his bill and make payment on the same. Of course, if the work was since found not to have been executed, according to the terms of the contract, there might arise a claim for damage or for other remedy against the contractor, but the fact remains that the petitioner had, in fact, fully performed his

part of the contract before the nomination, by completing this work, and a case such as this, in our view, is not hit by the disqualification of Section 7(d). In support of our above view, we may just quote an observation of the Authors in the Indian Election Law by Sarin and Pandit at page 271, which runs thus:—

> "Clause (d) of Section 7 of the Act of 1951, applies to executory contract only, and not to contracts completely executed before the election, and where all that remains to be done is for the Government to make payment to the contractor who receives the payment after the election."

Here too, the contractor is really found to have completed his part of the contract before the relevant time, and all that substantially remained to be done is for the Government to make payment to the contractor after checking his work and then drawing up a bill.

On behalf of the respondent, we were referred to Clause (6) of the Agreement incorporated in a copy of the original tender, to show when and in what circumstance, the contractor will be given a certificate of completion of his work. But this does not really provide that until such certificate is given, the work would not, in fact, be treated by the parties as completed, though it had really been so done. The provision made in the Clause is, therefore, of no assistance to the respondent, on the point under consideration.

About the second point of contention urged on behalf of the petitioner that the case is not hit by Section 7(d) by reason of the contract not having been with the Government of Assam *per se* this should also, in our view, succeed. Section 51 Sub-section 1 of the Assam Municipal Act (Assam Act I of 1923) provides that all property belonging to the Municipality shall vest in and belong to the Municipal Board, by which alone, under provision of Section 22 of the same Act, the Municipality will be represented for all purposes. On supersession of such Municipal Board, when the Government takes up the management, the management only vests in the Government under the provisions of Section 294 of the Act, but the properties belonging to the Municipality continue to belong to it, but they only vest in the Government for the purpose of management. So, on such supersession, it is not that the Municipality ceases to exist as an entity, but only the management of its business vests in the Government. In this view of the matter, the legal position of the Government substantially comes to be one of an Agent, and any contract entered into by the Government for the execution of any work of the Municipality, during such period of supersession, cannot be treated as a contract with the Government on its own account, in which the latter case alone, the operation of the disqualifying Clause of Section 7(d) would, in our view, appears to be attracted. This is a disabling enactment which has to be rigidly interpreted, and always in favour of the person sought to be disqualified, and in absence of anything before us to show that the Legislature's intention was otherwise, we should interpret the Section in a sense that is apparent, which is, to my mind, that the work must be one under-taken by the Government of Assam, on its own account, so as to attract the disqualifying Clause. That it was not so is apparent, and we have further the definite evidence of the Superintending Engineer (P.W.1) and the Executive Engineer (P.W. 4) on the point. Both state that the cost of the work was borne from the funds of the Municipality, which was of course raised by a loan given by the Government of Assam, and P.W. 4 further proves that in connection with the work, the Government would get 25 per cent. upon the cost towards their establishment expenses.

We would, thus, hold that the nomination of the petitioner was, in fact, improperly rejected, and in all cases of such improper rejection, there arises the presumption that the result of the election has been materially affected by reason of this. The law is well-settled on this point. Such presumption arises on the ground, among others, that the whole electorate is deprived of its right of free choice of a candidate for an election.

An issue has been lastly raised here, on behalf of the respondent as to whether in absence of the petitioner's specific pleading in the election-petition, of the fact of the result of the election, having been materially affected by reason of this improper rejection of his nomination, the petition should fail, as merely an improper rejection of nomination would not afford a ground for setting aside an election without it being further pleaded that the result of the election was materially affected by reason of such rejection. In answer to the above contention, made, on behalf of the respondent, reliance was placed, on behalf of the petitioner on the provision, contained in Order 6, Rule 13, C.P.C., and it is argued that this being a matter of fact, which the law presumes, in favour of the petitioner, it need not have been specifically pleaded, and the omission to plead this in

the election-petition could not be a fatal flaw. We agree in this view of the law and over-rule the objection.

With regard to *cost* of the case, we have been of the unanimous opinion that in the circumstance of the case, each party should bear his own cost.

(Sd.) A. DAS,
Chairman,—10-12-52.

The learned Chairman of the Tribunal has set out the case in his judgment and has also set out therein the issues framed in the case.

We are unanimous with the learned Chairman in our decisions on issues Nos. 2, 3, 4 and 5. We may however, state here, in brief, our decisions on these issues, in which we are unanimous with the Chairman. Our decision on issue No. 2 is that the Tribunal is competent to enter into the question of limitation even though the Election Commission has condoned the delay (of eight days) on the part of the Petitioner in presenting his election-petition, under proviso to Section 85 of the R.P. Act, 1951. On issue No. 3, our decision is that the Petitioner's nomination was improperly rejected by the Returning Officer and that such rejection has materially affected the result of the election and our decision on issue No. 4 is that the Petitioner's election-petition is not liable to be rejected for the absence of specific allegation of the election having been materially affected by the reason of the improper rejection of the Petitioner's nomination, and on issue No. 5, our decision is that the petitioner was not disqualified under Section 7(d) of the R.P. Act, 1951, to stand as a candidate, for the election in question as held by the Returning Officer. In regard to issue No. 5, our finding is that the Petitioner's contract, with the Government of Assam, in regard to certain works to be done by him in the Rehabilitation Market, had ceased and was no longer subsisting at the relevant date and we also find that his contract to do certain construction work in the Water Works of the Gauhati Municipality had been wholly completed long before his nomination-paper was filed. We further find there was no applicability of Section 7(d) of the R.P. Act to the petitioner's contract in regard to the Water Works of the Gauhati Municipality. The disqualifying Clause of the Section, by which one is sought to be disqualified, should be strictly construed. The word "contract" in the aforesaid Clause means a contract entered into by the appropriate Government *per se* (in the present case, it is the Government of Assam) on its own account, that is, to say for the benefit or interest of its own. In the present instance, on supersession of the Gauhati Municipality by the Government of Assam, the latter took over the management of the former, and with the supersession, although the property of the Municipality vested in the Government for the purpose of management, its ownership remained yet with the Municipality The Water Works in question remained the property of the Municipality even during the period of supersession. Whatever work the Government got done by the petitioner under the contract, referred to in the case, was done not for the interest of the Government itself but for the interest and benefit of the Municipality. The Government had the work done by the petitioner under the contract, for and behalf of the Municipality, and so as only an Agent of the Municipality. Section 7(d) of the R.P. Act being not applicable to the aforesaid contract, it would not therefore hit the nomination of the petitioner.

We are also in substantial agreement with the learned Chairman in his findings and also in his reasonings leading to his findings on the aforesaid issues, so much so that we do not think that we have to add to the same.

With regard to our decision on issue No. 1, on which the petitioner's case now turns, we have been unable to come to an agreement with the learned Chairman, the view taken by us on the point, having been different from the one taken by him, and we, therefore, proceed to record our view by this separate judgment, on the point.

The petitioner has alleged that his illness prevented him from presenting the election-petition in time. He filed the petition eight days too late. He asks for condonation of this delay. No doubt, the burden of proof rests on the petitioner asking for this concession. He is to furnish satisfactory evidence—evidence free from reasonable doubt,—in proof of the grounds taken for such condonation. He has alleged that he was suffering from typhoid which was responsible for the delay. The Respondent denies that the petitioner was at all ill and has adduced some evidence in disproof of the petitioner's plea of illness and to show that during the period he is said to have been ill he had been attending to his normal

activities. The Respondent gives evidence that on 24th March 1952, the petitioner (1) attended a Criminal Court at Gauhati in connection with his case against one Giridhar Saikia, in which admittedly O.P.W. Shri Galokeswar Goswami, Advocate, had been engaged by him as his lawyer for that case, and (2) was also attending the measurement of his work in connection with the Water Works of the Gauhati Municipality by Shri Lahkar, S.D.O. (P.W.D.), as is said to have been shown by the note in the measurement-book (Ext. A-1), which is again said to have been made by the said S.D.O. and endorsed by the petitioner with his signature under the aforesaid date, namely, 24th March 1952. The petitioner denies that he attended Court on 24th March 1952 or that he attended the measurement on that date. He asserts that his signature on the note in the measurement-book was taken by the P.W.D. Officer with a back date, as is often done by P.W.D. Officers. With regard to the first piece of the above evidence, Shri Goswami has proved that he filed the petition (Ext. E) on the date in the petitioner's criminal case and that under instructions received from the petitioner himself, which he used always to get in Court. The learned Chairman cannot, just as we also cannot, rely on the evidence of Shri Goswami to prove that the petitioner was personally present in the Court on the day (*i.e.*, 24th March 1952), his statement to that effect being really one of an inferential nature and we fully agree with the learned Chairman in his reasonings for coming to the conclusion, discarding the evidence of Shri Goswami.

Then with regard to the second piece of the above evidence, namely, the evidence of the note in the measurement-book (Ext. A-1), the learned Chairman has not relied on the above note in the measurement-book only and has found that the said note itself does not prove that the petitioner was actually present on 24th March 1952, when the measurement of the work is said to have been taken by the S.D.O.—Shri Lahkar. The Chairman has given his reasons why the aforesaid note in the measurement-book cannot be relied on, and we fully agree with him.

The respondent has next referred to another date, namely, 10th April 1952, on which date also it is alleged that the petitioner attended the Court in connection with his criminal case, referred to above. In this connection, the respondent has put in Ext. C., which is a hazira. Here, only the signature of the Pleader (Shri Kolita),—who is admitted to have been also engaged by the Petitioner in his above-referred to criminal case, is proved. This proof is really not sufficient in law to prove the contents of the document (Ext. C), or that the petitioner was really present in Court, on the day in question. The petitioner's sworn testimony is that on whichever dates he was personally present in Court he used to sign a document (a hazira or petition)—that was filed in Court. We were referred to Exts. 3-series in which the petitioner himself signed. Ext. C does not bear petitioner's signature and so also Ext. E—the petition filed by Advocate Goswami on 24th March 1952, does not bear the petitioner's signature. We agree with the learned Chairman's view that Ext C is not a sufficient proof that the petitioner attended Court on 10th April 1952, as against his sworn testimony that he was not present in Court on that date. It might be even suggested that if the petitioner had been really ill and unable to attend the Court on 10th April 1952, why the Pleader's clerk Tarini would put his name in Ext. C—the hazira. This will be a conjecture only and will not take us any further. This Clerk (Tarini), who purports to have written the Ext. C, was not produced by the respondent, though he was cited and summoned by him. In the above considerations, we find that there is no evidence and far less proof that the petitioner attended the Court on 10th April 1952.

Then coming to the plea of illness of the petitioner, we have the evidence of the petitioner himself and of the Doctor. The petitioner has also furnished a medical certificate (Ext. 2) that was granted to him by the Doctor on 15th April 1952. The evidence of the Doctor (P. W. 2) is that the petitioner was suffering from typhoid and that the petitioner was under his treatment from 20th March 1952 to 14th April 1952 and that at the petitioner's instance he granted him the certificate (Ext. 2) on 15th April 1952. He has further stated in his evidence that the petitioner was running temperature for more than a week—(temperature rising up to 102 degrees or so) and that he advised him to take complete rest as he was found very weak and that he should take rest for three weeks after the stage of convalescence. The petitioner's own evidence is that he was running temperature for about ten days. The question is whether on the evidence of the Doctor and of the petitioner and on the certificate granted by the Doctor, we can be satisfied that the petitioner was suffering from typhoid. No doubt, there was no laboratory test before the Doctor diagnosed that the case was one of typhoid. It will be too much to say—as we consider,—that in no case, a case of typhoid

can be detected or diagnosed without laboratory test. We see no reason to disbelieve the sworn testimony of the Doctor and to find that the petitioner was not really suffering from what the Doctor diagnosed as a case of typhoid. The respondent has examined O.P.W. Nirghuna (a neighbour of the petitioner) to disprove the petitioner's plea of illness. This witness says that he used to draw his water from the petitioner's compound and that he never found the petitioner ill during this one or one and half years. He is a packer in a Tobaco Company at Gauhati. The petitioner was not questioned by the respondent, if this witness used to draw his water from his compound .The witness came and sprang a surprise by saying that he used to draw his water from the petitioner's compound. We cannot place reliance on the evidence of this witness. Admittedly there are certain other persons, as neighbours of the petitioner, who are admittedly more respectable than this witness. None of such persons has been produced and examined by the respondent we have given our best consideration to the evidence and we are satisfied that the petitioner was suffering from the disease. The evidence of the petitioner and the Doctor is that the fever left the petitioner earlier than 14th April 1952 and that when the certificate was granted on 15th April 1952, the petitioner was in a state of convalescence. The certificate (Ext. 2) shows that the Doctor advised the petitioner to take rest on bed, during the period of convalescence. This explains the petitioner's statement in paragraph 11 of his election-petition that he was bed-ridden till 14th April 1952.

Then what remained to be considered is whether being a convalescent, the petitioner could go out of his house so soon as 15th April 1952, as admittedly he went that day to Court where he deposited the security-money in the Treasury, took out copy of the order of rejection of his nomination and also went to his Pleader in the evening that very day to get the present election-petition drafted by the Pleader. The explanation of the petitioner is that as it was a concern of his own he went out of his house on 15th April 1952 for those purposes. It is in evidence that when his nomination was rejected by the Returning Officer he filed a petition before the Hon'ble High Court. There is nothing to suggest that he had later abandoned the idea of challenging that rejection order by filing an election-petition in the appropriate quarter. When on 15th April 1952, he went out of his house to the Court against the Doctor's advice that he should take rest on bed, he did so at his risk. This shows, as we consider it to be,—that he was still keen to file an election-petition challenging the rejection order of the Returning Officer and the election itself which he was going to contest. We do not think that by going out of his house on 15th April 1952, the petitioner busied himself extensively and was moving about briskly from place to place in connection with the preparation for presenting his election-petition. It would not mean much time or labour, as every one of us knows, to deposit the security-money in the Treasury, and it would also be not anything too much of labour to have just filed a petition for a copy of the rejection-order and to get the copy thereof. Both these things could be done being in the Court-compound without having to go beyond it. To get the election-petition drafted by the Pleader would not, in the present instance, be a matter taking much time, in view of the fact that he had already filed a similar petition earlier before the High Court. The only thing, the drafting Pleader had to do, was to incorporate in the petition, as it appears, the fact of his illness for which he was late in filing the election-petition. He might have even suppressed the fact of his himself moving to Court and to the Pleader's house on 15th April 1952, if he was really not ill at all any time, previous to 15th April 1952, and if he had also the intention to put forward a false plea of illness with a view to explain away his delay in presenting the present election-petition The fact of his going out of his house on 15th April 1952, might only give rise to a suspicion or a doubt that he was not ill or so ill as not to have been able to get his election-petition prepared and presented earlier than when it was actually presented. A doubt must be a reasonable one for which he is to be denied the concession or condonation of the delay in presenting his election-petition. A reasonable doubt is one which cannot be over-come by reason or explained away. We consider that the aforesaid doubt is not one of the nature that is unexplainable or cannot be over-come by reason. In view of the considerations stated above, we are of the opinion that the fact of his going out of his house for the aforesaid purposes, does not give rise to any such doubt which is unexplainable and much less disprove that the petitioner was really unable, on account of his illness, to present the election-petition earlier than the date on which he despatched it to the Election Commission. He got it prepared on 15th April 1952, and despatched it the next day, *i.e.*, 16th April 1952, and it was received by the Election Commission on 17th April 1952.

In the above considerations, we find that the petitioner was really prevented by his illness from presenting the election-petition in question earlier than 17th

April 1952 and that he therefore deserves condonation of the delay in presenting the petition. We accordingly condone the delay in question and treat the election-petition as competent to be decided on its merits. We therefore decide the issue No. 1 in favour of the petitioner.

We have already found that the nomination of the petitioner was improperly rejected by the Returning Officer and that the improper rejection of his nomination has materially affected the election, in view of the established law that, when the nomination of a candidate, competent under the law to contest an election, is improperly rejected, the result of the election is materially affected thereby.

(Sd.) U. N. BEZHARUAH,

(Sd.) U. K. GOHAIN,

Members,
10-12-52.

ORDER

In the result, the order of the Tribunal, as expressed in terms of the views of the majority is; that the election is declared to be wholly void. No order is made as to cost of the parties.

(Sd.) A. DAS
Chairman,
10-12-52.

Sd./- U. N. BEZHARUAH,

Sd./- U. K. GOHAIN,

Members,
10-12-52.

[19/149/52-Elec.III]

S.R.O. 2079.—WHEREAS the election of Shri Ram Kishan, as a member of the Legislative Assembly of Punjab from Jullundur City North West Constituency has been called in question by an Election petition duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951), by Shri Prem Nath of Express Garden Road, Jullundur City;

AND WHEREAS the Election Tribunal appointed by the Election Commission in pursuance of the provisions of section 86 of the said Act, for the trial of the said Election Petition has, in pursuance of the provisions contained in Section 103 of the said Act, sent a copy of its order on the said Election Petition;

NOW, THEREFORE, in pursuance of the provisions of Section 106 of the said Act, the Election Commission hereby publishes the said Order of the Tribunal.

BEFORE THE ELECTION TRIBUNAL, JULLUNDUR

ELECTION PETITION No. 232 OF 1952

Election Petition presented to the Assistant Secretary, Election Commission New Delhi, on 2nd May 1952.

Prem Nath, one of the candidates for election to the Punjab Legislative Assembly 1951/52 from Jullundur City North West Constituency.—*Petitioner*

Versus

1 Ram Kishan, Elected member to the Punjab Legislative Assembly from Jullundur City North West Constituency 1951/52.

2. Durga Datt, Candidate for election to the Punjab Legislative Assembly 1951/52 from Jullundur City North West Constituency.

3. Shamir Singh, Candidate for election to the Punjab Legislative Assembly 1951/52 from Jullundur City North West Constituency.

4 Surindar Singh, Candidate for election to the Punjab Legislative Assembly 1951/52 from Jullundur City North West Constituency.—*Respondents.*

Election Petition to the effect that election of the Returned Candidate, Respondent No. 1, from Jullundur City North West Constituency to the Punjab Legislative Assembly 1951/52 be held void or the Election be held as wholly void and that

the Returned Candidate, Respondent No. 1, be disqualified for membership of the Legislative Assembly etc. for indulging in corrupt and illegal practices and for lodging a wrong return of Election Expenses and on an improper form.

ORDER

The election of Shri Ram Kishan (Congress) to the Punjab Legislative Assembly from the Jullundur City North West Constituency in the last general Election has been challenged by one of the defeated candidates Shri Prem Nath Mayar. It is common ground that the returned candidate secured 16,099 votes against 5,142 obtained by the petitioner.

Shri Prem Nath Mayar claimed the relief for a declaration that the election to this Constituency be adjudicated wholly void or in the alternative that of the returned candidate void It was further prayed that the returned candidate should be disqualified for membership of the Legislative Assembly as he had indulged in corrupt and illegal practices.

Though two reliefs were claimed in the alternative in the heading of the petition, in the prayer itself the petitioner asked for the election of the returned candidate to be declared void. In the statement made by the counsel of the petitioner both the reliefs were sought. The principal grounds on which the petition is founded are:—

(a) that the nomination papers of Shri Ram Rakha a candidate for election from this Constituency were improperly rejected,

(b) the prevalence of undue influence,

(c) violation of certain statutory rules, and

(d) the commission of corrupt and illegal practices by the returned candidate.

Shri Ram Kishan alone has come forward to contest the petition which was duly notified in the official gazette under Section 90 of the Representation of the People Act hereinafter called the Act. It was pleaded on his behalf that the petition was filed with the Commission beyond the prescribed statutory period and that the necessary parties have not been impleaded. It has further been pleaded that the petitioner has not given a concise statement of the material facts relating to the corrupt and illegal practices said to have been committed by the contesting respondent. Objections have been raised about the form of the petition in so far as there is failure to comply with the requirements of the Civil Procedure Code relating to verification of pleadings. The frame of the petition has lastly been questioned on the ground that the petitioner in the statement of his counsel before issues has preferred two of the three reliefs mentioned in Section 84 of the Act while it is permissible to claim only one of the three.

In view of the nature of the pleadings it was found necessary by the Tribunal to frame the following preliminary issues for trial:—

1. Whether the Election Petition filed by Shri Prem Nath is barred by time?

2. Whether the Tribunal can dismiss the petition on the ground of limitation, if it is found that the petition was not presented within the prescribed period?

3. Have all the necessary parties been impleaded in the petition? If not, is the petition liable to be dismissed on this account?

4. Have the petition and the annexure thereto been properly verified under the provisions of the Code of Civil Procedure? If the answer is in the negative, what is the effect?

5. Has the petitioner failed to comply with the provisions of Section 83 of the Representation of the People Act? If so, is the petition not liable to be dismissed?

6. Whether the petition is defective on the ground that the petitioner has claimed two out of the three reliefs mentioned in Section 84 of the Representation of the People Act? If so, what is its effect?

No evidence has been led by the parties on the issues which are purely of a legal character apart from the documents filed by the petitioner and not challenged by the respondent.

Issues No. 1 and 2

There is not much substance in the objection relating to limitation. The return of the election expenses of the returned candidate was published in the official Gazette of 18th April, 1952. An Election Petition according to Rule 119 of the Representation of the People (Preparation of Election Rolls) Rules, 1950, may be filed not later than fourteen days from the date of publication and the return of election expenses in the Official Gazette. The Election petition of Shri Prem Nath Mayar was received according to the postal acknowledgment Ext. P. 1 in the Office of the Election Commission on 1st May, 1952. The Treasury challan Ext. P. 3 also shows that the requisite deposit of Rs. 1,000 was made as security prescribed by the Act on 30th April, 1952. The petition was clearly filed within the prescribed period.

Issue No. 3

Section 82 of the Act provides that—

> "a petitioner *shall* join as respondents to his petition all the candidates who were *duly nominated* at the election other than himself if he was so nominated".

It is the case of the respondents that Shri Virendra, Shri Yash Paul, Shri Mul Raj, Shri Jaishi Ram, Shri Mahavir, Shri Hari Kishan, and Shri Ram Rakha were the duly nominated candidates and should have been impleaded as respondents. Although four respondents have been joined in the petition, including Shri Ram Kishan, yet the names of the seven persons mentioned aforsaid do not figure therein. According to the petitioner the seven candidates excluding Shri Ram Rakha have been left out from the array of respondents because their candidatures had been withdrawn within the prescribed period. Shri Ram Rakha has not been impleaded because his papers had been rejected by the Returning Officer on the date of scrutiny.

In order to appreciate the respective contentions of the parties it becomes necessary to set out briefly the substance of the provisions relating to nomination of candidates. The first stage in an election is the nomination of a candidate. Under the provisions of Sections 33 and 34 of the Act a person becomes "a duly nominated candidate" on his making the requisite deposit if he files his nomination papers with the Returning Officer within the prescribed time duly proposed and seconded coupled with a declaration that the candidate has appointed an Election Agent who is not disqualified to act as such under the Act. The Returning Officer before whom the nomination papers are filed after satisfying himself about these matters then proceeds with the process of scrutiny under the provisions of Sections 35 and 36 of the Act in presence of the candidates, their sponsors and election Agents. The Returning Officer on scrutiny may accept or reject the nomination papers after hearing the objections, it any, to such papers. Section 37 prescribes that after the scrutiny any candidate may withdraw from the contest by giving notice in writing to the Returning Officer. Those "duly nominated" candidates who have not withdrawn their candidatures and whose papers have been accepted after scrutiny by the Returning Officer are styled "validly nominated" candidates under Section 38 of the Act and such valid nominations are made public. In a nutshell a duly nominated candidate who has passed through the process of scrutiny and has not withdrawn his candidature becomes a validly nominated candidate. Be it noted that a candidate remains duly nominated even if he withdraws his candidature under Section 37 or his papers are rejected during scrutiny under Section 36.

It appears to us that the line of distinction between a "duly nominated" and a "validly nominated" candidate is at once clear and definite. The petitioner appears to have been under some misapprehension in his concept of a duly nominated candidate who under Section 82 "shall" be impleaded a party to an election petition. All the seven persons whose names have been mentioned earlier including Shri Ram Rakha were duly nominated candidates in this view of the matter. Despite the withdrawal of the six candidates and the rejection of the nomination papers of Shri Ram Rakha after scrutiny it was incumbent on the petitioner under Section 82 to have impleaded them as parties.

The question then remains, what is the effect of non-compliance of the requirements of Section 82? The answer to this query must turn very largely on the construction to be placed on the word "shall" and the absence of any clear words in the Statute to indicate the intention of the legislature laying down the penalty for non-compliance.

The Representation of the People Act is a special enactment to deal with elections and election disputes. The provisions in Chapter VI relating to disputes regarding elections have been carefully analysed by the learned counsel who have

appeared before us. There are two observations which we would like to make at the outset. The object underlying the Chapter seems to be a speedy determination of election disputes and in furtherance of this objective, the Legislature in its wisdom has thought it necessary to introduce certain clauses to which we would advert in the course of this judgment. The application and scope of the provisions of the Code of Civil Procedure in the second place have been considerably restricted by the Legislature. In construing the relevant provisions of the Act it would be necessary to place these two broad considerations in view

It is true that the word "shall" is not always used in its mandatory sense. There are occasions when the Courts have construed this word in only a directory sense. The matter has really to be determined by ascertaining the real intention of the Legislature as a result of careful perusal of the scope and object of the Act. It is our view that the obligation laid down in Section 82 must be obeyed and fulfilled for otherwise the scope and purpose of the enactment would be completely frustrated. Election disputes sometimes require the presence of all the duly nominated candidates and it has been enjoined by the legislature that a petitioner should implead them in his petition. The duty is also cast on the Tribunal under Section 90 of the Act to cause a copy of the petition to be published in the official Gazette and any party who is interested in the dispute may seek to be impleaded within 14 days from its publication. The combined operation of these provisions leaves no manner of doubt that the intention of the legislature is to afford opportunity to all the possible interested parties in an election dispute to be present before the Tribunal at the earliest possible stage. Although the Code of Civil Procedure is made applicable to the trial of the election disputes, as far as it is possible; it must be noted that the scope of the amendment of a petition which comes up for trial is very limited indeed. It is only under clause (3) of Section 83 that further and better particulars in a petition can be asked for by way of amplification and this proviso has been consistently held by Election Tribunals in the past to exclude amendment as is understood in legal parlance under the Code of Civil Procedure. As in our view, no parties can be added after the petition has been filed under the provisions of the Act, the legislature has found it necessary to prescribe that all duly nominated candidates should be impleaded as respondents at the earliest stage. The duly nominated candidates appear to be the extreme limit of necessity for joinder of parties in a petition, and a petitioner is accordingly directed to implead them in his petition.

An Election Petition as presented to the Commission is sent to the Tribunal for trial, and before any further steps are taken, the Tribunal causes a copy of it to be printed in the official Gazette under Section 90(1) of the Act. Within a fortnight of the publication a person may move the Tribunal for being made a party. The procedure clearly does not contemplate the addition of a party to an original petition save in the manner prescribed. It is undoubtedly to emphasise at once the stringency and finality of the rule embodied in Section 82 that the word "shall" has been used in the context, and we have no doubt that the only legitimate meaning which could be given to the word is in a premptory sense which its grammatical connotation implies.

It has been contended by the counsel for the respondent that an order of dismissal of a petition must ensue on this finding of the Tribunal. The argument of the counsel for the petitioner on the other hand is that even if the word "shall" in its collocation be regarded as mandatory, no provision has been made in the Act to justify the Tribunal dismissing a petition which fails to implead the duly nominated candidates as respondents. By virtue of Section 85 of the Act the Election Commission after a perusal of the petition presented before it is bound to dismiss it if it fails to conform to the provision embodied in Sections 81, 83 and 117. Section 81 broadly lays down the form of the petition, and the mode of its presentation. The provisions of Section 81 will not be complied with if a petition is not presented by a competent person, or it is not delivered at the Office of the Commission in the manner prescribed within the allotted time. Section 83 requires a petition to contain a concise statement of the material facts on which the petitioner relies, and Section 117 requires the petitioner to deposit a sum of Rs. 1,000 as security before his petition could be entertained.

The powers of dismissal conferred on the Tribunal are co-extensive with those of the Election Commission as far as Sections 81, 83 and 117 are concerned under clause (4) of Section 90, with this difference that while the Election Commission 'shall' dismiss a petition, the Tribunal is only given discretion to do so. The Tribunal alone has the power to dismiss an election petition after the conclusion of a trial under Section 98 of the Act. It is common ground that no indication is to be derived from any express words in the Statute itself about the intention of the legislature when a petition has failed to implead all the parties under Section 82.

It has been contended on behalf of the respondent that it is a necessary and logical corollary of Section 82 that a petition which does not conform to its mandatory requirements ought to be dismissed Such a construction in our view should be avoided unless there is compelling context, to the contrary. When a Statute requires a thing to be done, but does not impose a specific penalty for its non-performance, it is not open for a Court to draw inferentially a conclusion that a penalty is incurred. (Maxwell Interpretation of Statutes 9th edition page 359-360). No specific rule can be laid down for determining whether the command of the legislature is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard or as imperative with an implied nullification for disobedience. (Maxwell Interpretation of Statutes 9th edition page 373). Broadly speaking the Courts would be guided in arriving at their conclusions by the Justice and convenience involved and also of course by the over-riding consideration about the scope and object of the Statute itself. There are many requirements in the Code of Civil Procedure which are of a mandatory nature and yet their non-compliance does not invariably entail the dismissal of the suits. A dismissal of a petition or a suit is an extreme penalty which as a rule shall not be exacted from a defaulting party unless there is clear and unambiguous guidance on this point in the words of the Statute. Coming to the Act itself, we observe that in some cases a petition in which the parties required to be impleaded under Section 82 have not been joined will result in the penalty of dismissal at the conclusion of a trial in as much as the matters in dispute would not be capable of solution without the presence of the parties who have been omitted from the petition. It is also possible on the other hand to visualise instances where the Tribunal would be able to determine the question between the petitioner and the contesting respondent without requiring the presence of the parties who have not been impleaded and in such cases in our opinion it would involve a miscarriage of justice if a petition is dismissed because of the non-compliance of the requirements of Section 82. As we have already indicated there is no sanction in the provisions of the Act to permit a Tribunal to implead new parties. A petition therefore in which all the respondents have not been joined will invariably carry with it the dead weight of its won infirmity and will certainly in the end entail the penalty of dismissal. Considering the problem from all the different aspects, we think that though the word "shall" has been used in Section 82 in an imperative sense, yet there is no warrant for us to hold that a non-compliance must result in a summary dismissal of the petition. As we have indicated it would still be possible and indeed desirable in some cases to proceed with the inquiry which as has been rightly emphasised is of public importance.

This literal construction which we propose to adopt of Section 82 will do violence neither to the language nor the intention of the legislature as it does no more than construe the words as they are without any addition or omission. We must frankly confess that owing to the non-appealable character of its orders, we are clearly of the opinion that the Election Tribunal should refrain from adopting the extreme views which have been advanced by the contending parties on this issue, as it would then be able to decide vital question in controversy in suitable cases, wherever it is possible to do so even without the presence of all the parties who should have been impleaded as respondents. Our decision on this issue therefore is that all the necessary parties have not been impleaded in the petition, but it cannot be dismissed on this score.

Issue No. 4

The verification of the petition is not strictly in accordance with the provisions of the Code of Civil Procedure in as much as it is not stated which paragraphs of the petition are true to the knowledge of the petitioner and which one according to his information and knowledge believed to be true. The place where the petition was verified is not mentioned either. These are defects which could always be cured and we do not attach much importance to them. We hold that there is sufficient compliance of the provisions relating to verification of pleadings.

Issue No. 5

A perusal of the petition shows clearly that it is extremely vague. It was frankly conceded at the bar that the petition was drafted by Shri Prem Nath Mavar himself without the assistance of a counsel. This explains to a large extent the vital lacunae and defects in the petition, and, as in the view which we take that the Tribunal has no powers to allow amendment in the pleadings, the consequences of such a default is not a matter which can be said to be in any doubt.

Before setting out the brief contents of the petition we may advert to Section 83 of the Act which requires that—

> "An election petition shall contain a concise statement of the material facts on which the petitioner relies.....The petition shall be accompanied by a list...setting forth full particulars of any corrupt or illegal practices which the petitioner alleges, including as full a statement as possible as to the names of the parties alleged to have committed such corrupt or illegal practice and the date and place of the commission of each such practice".

We have already alluded to clause (3) of Section 83 which empowers "the Tribunal to allow the particulars *included* in the said list to be amended or order such further and better particulars...as may in its opinion be necessary for the purpose of ensuring a fair and effectual trial of the petition".

A Tribunal under Section 100 of the Act is empowered to declare an election wholly void, if in its opinion the corrupt practice of bribery and undue influence have so extensively prevailed that the election cannot be deemed to be free or when the same result has been brought about by intimidation and coercion exercised by one group, section or community over another, and lastly if the result of the election has been materially affected by the improper acceptance or rejection of nomination papers. The election of a returned candidate may be declared void by the Tribunal on the happening of either of the three following events:—

(a) if the election has been brought about or the result has been materially affected by any corrupt and illegal practice,

(b) the commission of a corrupt practice by a returned candidate or his agent or with their connivance, and

(c) the result of the election has been materially affected by the improper reception or refusal of a vote or non-compliance with the provisions of the Constitution, the Act, and the Rules of Election.

The corrupt and illegal practices which render the election of the returned candidate void are enumerated in Sections 123 to 125 of the Representation of the People Act. Broadly speaking the major corrupt practices under Section 123 are bribery, undue influence, personation, removal of a ballot paper from the polling station, publication of false statements about the personal character or conduct of any candidate, the hiring or procuring of transports for the use of voters, unauthorised expenditure on elections, and the procurement of the services of a Government servant for the furtherance of the prospects of a candidate's election. When any of the practices mentioned in Section 123 are perpetrated by persons other than the candidate or his agent they are styled "minor corrupt practices" under Section 124. In addition certain other practices are called minor and *inter alia* these are : The submission of return of election expenses which is false in any material particulars, and the systematic appeal to vote or refrain from voting on grounds of caste, race, community or religion. There are three illegal practices enumerated in Section 125 : (1) The incurring or authorisation of any expenditure in connection with a public meeting by a person other thar a candidate or his agent. (2) The hiring, using or letting, as a committee room any place where intoxicating liquor is publically sold, or (3) the issuing of any circular, placard or poster relating to the election.

Having set out the statutory provisions it remains to be seen whether the petition discloses with sufficient precision any of the corrupt or illegal practices which have been defined therein. The first paragraph mentions that the election may be declared void because of the improper rejection of the nomination papers of Shri Ram Rakha.

It is next alleged that the election has not been a free one because of the prevalance of undue influence extensively in the Constituency during the election. It is however not a matter of speculation as to what undue influence is. It has been stated under clause (2) of Section 123 that 'undue influence' is said to be exercised if any candidate or elector is threatened with injury of any kind including social ostracism and excommunication or expulsion from any caste or community, or he is induced to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure. These are the limits of undue influence and cannot be extended any further. In the petition it is pleaded that undue influence was exercised because the polling booths and the ballot boxes did not conform to the requirements of Sections 18 and 19 of the Representation of the People (Conduct of Elections and Election Petitions) Rules 1951, and further that the emblems and symbols of the Congress candidate were allowed to be taken inside the Polling Booths in violation of Rule 130 of the aforesaid Rules. Neither of these practices, even if proved,

can be deemed to fall within the category of undue influence though they may conceivably amount to violation of electoral rules.

It is alleged in paragraph 2 (c) of the petition that cases of blackmarketing were brought up against persons without any cause and were subsequently dropped on the understanding that the persons involved would support the Congress candidate. Nothing beyond this assertion is stated in the petition and the allegation does not fall within the ambit of undue influence. The same observation applies to clause (d) of paragraph 2 in which it is stated that the Presiding Officer and the Polling Officers connived at the voters casting their votes for the Congress candidate. Paragraph 3 of the petition sets out breaches of Rule 26 of the Representation of People Act (Conduct of Elections and Election Petitions) Rules 1951, by the Returning Officer No specific instance is given of the contraventions said to have been committed by the Returning Officer and in absence of any date, name or place it is impossible for any respondent to give an answer to vague and indefinite charges which have been levelled in the petition. It may also be observed in parenthesis that the petition has been drafted without any comprehension of the meaning of "undue influence" or the scope of Section 100 of the Act.

In paragraph 5 of the petition it is stated that "the returned candidate published statements which were false and which were intended to create hatred against the petitioner and prejudice the prospects of the petitioner's election". An allegation of this nature without any details cannot for obvious reasons be replied by any respondent. It is our opinion that not one fact has been brought out in the petition under the heads of corrupt or illegal practices which might be regarded "a concise statement of the material facts" on which the election of the returned candidate may be declared void.

In some of the sub-paragraphs, the petitioner has merely repeated the words of the Statute itself, for instance at one place it is stated that the returned candidate issued posters which did not bear on their face the name and address of the printer. This allegation is amplified in the list of corrupt and illegal practices submitted as an annexure with the petition by a statement that the returned candidate published "Ek Lakh Rupia Inam" and "Godse Ki Barsi" to prejudice the voters against the petitioner. It is not indicated however what connection did the publication have with the returned candidate or in what manner did it prejudice or impede the petitioner's cause in the election.

Such particulars as have been furnished by the petitioner suffer from one other infirmity. It is essential for a party who seeks the second declaration under Section 100 to state specifically that the result of the election has been materially affected by the corrupt and illegal practices not committed by the candidate or his agent as also to the breaches of provisions of the Constitution and the Act. The petition is totally bereft of such an assertion. On a fair reading of the petition, therefore, it is our opinion that the contents of the petition with minor exception of paragraph 1 do not conform with the requirements of Section 83 of the Act.

It has been urged by the learned counsel for the petitioner that the replication filed by the petitioner has remedied any defects which may have existed in the petition itself. In any event it has been urged that we should resort to the provisions of Section 83 (3) for the assistance of the petitioner by calling for further and better particulars from him We have given our very careful consideration to these contentions and our conclusions on this aspect of the case are that the Tribunal has no power co-extensive with the Civil Procedure Code in respect of amendment of pleadings. True, the Tribunal is enjoined to follow the provisions of the Code of Civil Procedure as far as the trial of petitions are concerned. The Act in our view however envisages that the Tribunal must have before it a petition which contains in a reasonable and concise form the particulars on which an election is sought to be set aside. Unless there is this nucleus of the minimum requirement, the Tribunal need not and indeed cannot call upon the defaulting party to furnish further and better particulars. Incidentally it may also be observed that clause (3) of Section 83 lays down the limits within which the Tribunal is empowered to act in this matter. The law of election and Election Tribunals is a subject matter of special legislation and it must override the provisions of general law as contained in the Code of Civil Procedure. If in the special legislation a certain mode is prescribed it is not legitimate for a Tribunal acting under the special Law to resort to the provisions of general Law. It has been consistently held by the Election Tribunals in the past that a petition to challenge an election cannot be amended though the Commissioners have powers to call for further and better particulars The legal position in our opinion has been correctly and succintly summarized by Pt Nanak Chand in the Law of

Elections and Election Petitions in India at page 388 of this tretise (1951 edition). It is observed by the learned author that "an amendment to a petition would be contradictory to the whole tenor and spirit of the Act".

The replication filed in the present case is in reality a fresh petition as it incorporates particulars and instances to which no reference is made in the original petition. If the Tribunal were to regard this further pleading as admissible, it would be re-writing Section 83 of the Representation of the People Act for the benefit of the petitioner. If such a course were adopted the Tribunal would be setting before itself the unauthorised task of trying a petition which is different and distinguishable from the one which was presented before the Commission and notified in the official Gazette under Section 90 of the Act, a procedure which in our opinion would be against the letter and spirit of the provisions to which we have alluded in great detail. We hold accordingly that the petition save for paragraph (1) does not comply with the provisions of Section 83 of the Act and merits a dismissal.

Issue No. 6

It remains to say a few words about the matter covered by this issue. Under Section 84 of the Representation of the People Act a petitioner may claim any of the following declarations:—

(a) that the election of the returned candidate is void;

(b) that the election of the returned candidate is void and that himself or any other candidate has been duly elected; and

(c) that the election is wholly void.

The petitioner contends that it is open to him to claim two out of the three reliefs and also to claim two reliefs in the alternative. As has been observed the relief sought by the petitioner towards the end of the petition is merely a declaration to have the election of the returned candidate adjudicated void. Subsequently it was added by the statement of the counsel that the entire election should be declared void.

Although the word 'anyone' used by the legislature supports the contention of the respondent, it cannot be said whether the remedy in the alternative is barred to the petitioner. The matter does not need be proved any further as it was stated at the Bar by the counsel for the petitioner that if he has to make a choice, between the two remedies, the one for a declaration to have the election declared wholly void would be selected.

The result of our findings is that as the petition does not contain a concise statement of the material facts on which the election of the returned candidate can be declared void, we can proceed to trial only with the first paragraph of the petition without the addition of any further parties. An issue will be framed accordingly. The rest of the petition will stand *pro tanto* dismissed. We make no order as to costs as the success has been equally divided on the issues which are purely of legal character.

The 11th October 1952.

I agree.

(Sd.) M. S. PANNUN, *Member*,

11-10-52.

(Sd.) SHAMSHER BAHADUR, *Chairman*.

I agree.

(Sd.) CHHAJJU RAM, *Member*,

11-10-52.

BEFORE THE ELECTION TRIBUNAL, JULLUNDUR

ELECTION PETITION No. 232 OF 1952

Shri Prem Nath *versus* Shri Ram Kishan.

CORAM

Shamsher Bahadur Bar.-at-Law—*Chairman.*

Chhaju Ram, B.A. LL.B., P.C.S., } Members of the
Mohindra Singh Pannun, M.A.LL.M.D.C.P. } Election Tribunal

Judgment (Per Shamsher Bahadur.—*Chairman*).

JUDGMENT

In this petition Shri Prem Nath, the defeated candidate, who secured 5,142 votes has challenged the election of the Jullundur City North West Constituency

which returned Shri Ram Kishan as the successful candidate who secured, 16,098 votes. The election was challenged on many grounds by Shri Prem Nath while the contesting respondent Shri Ram Kishan raised a number of preliminary objections. In the first instance the Tribunal framed six preliminary issues which were disposed of by order dated 11th October, 1952. This judgment will be read in continuation of the previous order. After the decision of the preliminary issues the area of controversy has been greatly curtailed and only the following questions now arise for decision.

1. Whether the nomination paper of Dr. Ram Rakha was improperly rejected by the Returning Officer?
2. If issue No. 1 is found in the affirmative, what is the effect?
3. Can the petitioner at this stage challenge the validity of the rejection of the nomination paper of Dr. Ram Rakha?

The facts on which the decision of these issues must turn are indisputable. Dr. Ram Rakha, a candidate for election in this Constituency, filed his nomination paper on 5th November, 1951. His paper was rejected by the Returning Officer on the ground that the declaration as to choice of symbols specified only one preference instead of three. This objection which found favour with the Returning Officer was raised by Shri Prem Nath, the petitioner himself, who now seeks to impugn the election on the ground that the nomination paper of Dr. Ram Rakha was improperly rejected. We have held that Dr. Ram Rakha in our opinion was a duly nominated candidate and he ought to have been impleaded as a respondent. In spite of the failure of the petitioner to implead Dr. Ram Rakha in the petition, it was held by our order dated 11th October, 1952, that the Tribunal was not empowered to dismiss the petition.

The first question which calls for decision is whether the nomination paper of Dr. Ram Rakha was improperly rejected. A person seeking election is required under Section 33 of the Representation of the People Act 1951, hereinafter called the Act, to submit his nomination paper before the appointed date completed in the prescribed form. The statutory rules framed under the Act called the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951, have prescribed certain requirements for such nomination papers. Under clause (2) of Rule 5, it is laid down that every nomination paper delivered under Section 33 of the Act "shall be also accompanied by a declaration in writing specifying the particular symbol which the candidate has chosen for his first preference out of the list of symbols for the time being in force under sub-rule (1) and also specifying two other symbols out of that list which he has chosen for his second and third preferences respectively".

The prescribed form of nomination paper in Schedule 2 provides under the declaration column three blank spaces for the candidate to show his preferences of symbols. The proviso to rule 5 further lays down that "the choice to be made by a candidate under this sub-rule shall be subject to such restrictions as the Election Commission may think fit to impose in that behalf". Before dealing with the respective contentions of the parties, reference may also be made to another statutory provision relating to the issue in controversy. Clause (4) of Section 36 of the Act relating to the scrutiny of nominations provides that "the Returning Officer shall not reject any nomination paper on the ground of any technical defect which is not of a substantial character".

It is the case of the petitioner that the mention of only one symbol by Dr. Ram Rakha instead of three is at the most only a technical defect of an insubstantial character and should not have resulted in the rejection of his nomination paper. On the other hand the argument which has been advanced by the returned candidate is that the defect in the nomination paper left no option with the Returning Officer but to dismiss it. In any event the rejection of nomination paper did not materially affect the election. Moreover it does not lie in the mouth of the petitioner to take up cudgels on behalf of Dr. Ram Rakha who was not even impleaded a respondent in these proceedings. It was further contended that Shri Prem Nath himself having raised the objection with regard to the validity of Dr Ram Rakha's nomination paper he could not now be heard to say that the position taken up by him at that time was untenable in law; the petitioner in other words could not approbate and reprobate at the same time. As would be seen these contentions are the subject matter of the three issues which can conveniently be dealt with together.

On behalf of the petitioner reliance has been placed on certain "Instructions" which have been sent from time to time by the Election Commission for guidance of the Returning Officers. It is well to point out that it was only on 10th

November, 1951, that the Secretary of the Election Commission sent a circular letter to the Chief Electoral Officers of different States expressing the view that "although the law requires each candidate to choose three symbols in his nomination paper, the mention of only one symbol by a candidate would merely amount to a minor defect which should be overlooked". Evidence has been led to show that Dr. Ram Rakha brought to the notice of the Returning Officer on 9th November 1951, that a Press Note of this description had appeared in some newspaper. As the Returning Officer however was not shown the proper authority, he felt obliged to reject the nomination paper of Dr. Ram Rakha. Both the Returning Officer Shivram Singh and Dr. Ram Rakha have appeared as witnesses to depose about these facts.

There is a circular letter issued by the Election Commission on 10th September, 1951, (Ext. P. 8) to which the counsel for the respondent has pointedly drawn our attention. In the last paragraph of this letter, it is stated that "without encroaching on the discretion or the judgment of the Returning Officer, the Commission may observe that in its opinion any such defect in the matter of choice of symbols is technical in nature.....". There can be no manner of doubt that a large number of restrictions had been placed regarding the choice of symbols by candidates at the time of filing nomination papers, *and it was only with regard to the choice* that the Commission was expressing its opinion, for the guidance of the Returning Officers. It appears to us that the matter was by no means free from doubt and the Returning Officer in rejecting the nomination paper of Dr. Ram Rakha on 9th November, 1951, was by no means adopting a view which was either unreasonable or technical. It is well to emphasize that the Returning Officer on that date had before him only the statutory rule requiring the candidate to make a declaration giving three preferences with regard to symbols. The argument of the counsel for the petitioner that Dr. Ram Rakha being an accredited representative of the Socialist Party had to be assigned a symbol of that party namely a tree, and consequently he was not bound to give the second and third preferences does not commend itself to us. At the time of filing the nomination paper the Returning Officer had no means of knowing that Dr. Ram Rakha was an accredited candidate of the Socialist Party.

A defect of a technical nature according to the Dictionary meaning relates to a "difficulty arising in connection with a matter of procedure". A perusal of the letters which have been issued by the Election Commission shows that some guiding principles were being evolved as difficulties presented themselves to the Returning Officers who in turn communicated them to the Election Commission with regard to the choise of symbols. The entire correspondence which has been placed on the file except the letter Ext. P. 10 relates to the *choice of symbols* which is mainly a matter of procedure. The mandatory requirement regarding the number of symbols however does not appear to us to be a matter of mere procedure. It was the assignment of symbol to a candidate by a Returning Officer which was to be governed by the rules and directions issued by the Election Commission and the Chief Electoral Officer after a consideration of the problems presented before these authorities.

Moreover we cannot presume that the statutory requirement of the mention of three symbols in a nomination paper is a superfluity. The Returning Officer had to make his decisions about the assignment of symbol after a consideration of the preferences of the different candidates. If the first choice of a candidate clashed with the first choice of another, then obviously the symbol could be allotted to only one of the two candidates. To facilitate the decision of the Returning Officer on such matters the legislature in its wisdom considered it imperative for the candidate to give three preferences of the symbol. We have no material to come to a conclusion that the defect in the nomination paper of Dr. Ram Rakha was either technical or insubstantial, till the Election Commission gave its opinion on 10th November, 1951. The Legislature has chosen the Returning Officer to decide such matters as the validity of nomination paper and no right of appeal has been granted to an aggrieved party to challenge such an order. The Tribunal can no doubt declare an election to be void if in its opinion the acceptance or rejection of nomination paper is improper. It seems to us that the Tribunal would be entitled to interfere with the orders of the Returning Officer only when a perversity or some violation of the principles of natural justice is to be discerned in the impugned order of a Returning Officer. In cases where a Returning Officer may give one of the two possible decisions, it would not be a fit case for interference of the Tribunal. The very fact that the Election Commission considered it necessary to give an expression to its views on 10th November, 1951, shows that the matter till that date was not free from doubt and controversy. On a perusal of the evidence both documentary and oral, it is our conclusion that the Returning Officer on the 9th November, 1951, had sufficient justification for rejecting the nomination paper of Dr. Ram Rakha.

In this view of the matter, it is not necessary for us to determine whether the result of the election has been materially affected by the rejection of the nomination paper of Dr. Ram Rakha, on which question a good deal of evidence has been adduced. Though we are naturally reluctant to strike a discordant note from the generally accepted view, of the Election Tribunals that the improper rejection of a nomination *ipso facto* affects materially the result of an election, we would like to make a few observations. It is anxiomatic to say that an authority must be deemed to have been decided on the facts of a particular case and we venture to say that rejection in this case of the nomination paper of Dr. Ram Rakha could not conceivably affect the election result. In all the election cases which have been brought to our notice, either the petitioner himself was the candidate whose paper was rejected or in the alternative it was the respondent whose acceptance of nomination paper was in question. The remarkable feature of the present case is that Dr. Ram Rakha whose nomination paper is said to have been improperly rejected has not been made a party and as a witness of the petitioner he has frankly stated that he has no interest whatsoever in the disputed question which we are called upon to resolve. Moverover Dr. Ram Rakha, who filed his nomination paper as an accredited representative of the Socialist Party espoused the cause of Shri Durga Datt during the election after the rejection of his own paper and indeed this gentleman was adopted by the Socialist Party as its own candidate for this election. Dr. Ram Rakha has admitted that the leaders of the Socialist party including Shri Jai Parkash Narain convassed for Shri Durga Datt during the election campaign. Shri Durga Datt who commanded a considerable personal influence in the town was lent all the support which was available to the Socialist party including the active assistance of Dr. Ram Rakha, and inspite of these favourable influences managed to secure only 1435 votes as against 16,098 of the returned candidate and 5,142 of the petitioner.

It may reasonably be asked, what objective facts are there before the Tribunal to enable them to come to a conclusion that the result of the election has been materially affected by rejection of Dr. Ram Rakha's nomination. We can think of none. Every word in a Statute must be given its natural meaning, as far as it is possible and superfluity cannot generally be attributed to Legislative enactments. It seems to us therefore that a Tribunal can only declare an election void if in the opinion of the Tribunal the result of the election has been materially affected in consequence of an improper rejection of nomination.

The only other question for disposal may be described as that of estoppel. It has been contended that the petitioner by his own conduct has precluded himself from claiming the relief of having the election declared wholly void on the ground that he himself was instrumental in having obtained the order of rejection from the Returning Officer of the nomination paper of Dr. Ram Rakha. No party according to this argument should be allowed to blow both hot and cold. We are not inclined to import this equitable doctrine in Election disputes. It must be borne in mind that the proper conduct of elections is a matter of profound concern for the entire electorate and nothing can be permitted to impair the right of every voter to question the validity of an election before a Tribunal. If such a right vests in every voter, how can the petitioner be denied a hearing in such a capacity? It is in our opinion irrelevant that the petitioner himself connived at the "illegality" which he has sought to bring to the notice of the Tribunal.

In the result our conclusion is that there is no reason to hold that the nomination paper of Dr. Ram Rakha was improperly rejected. The petition fails and is dismissed. The petitioner will pay Rs. 250 as costs to respondent No. 1.

CAMP AMRITSAR;

Announced.

The 10th December, 1952.

(Sd.) SHAMSHER BAHADUR,
Chairman.
Election Tribunal, Jullundur.

I agree.

(Sd.) CHHAJU RAM,
Election Tribunal.
Member,

The 10th December, 1952.

(Per Mohindra Singh Pannun, Member, Election Tribunal.)

I have seen the final order proposed by the learned Chairman. This order is in continuation of the order passed by us on 11th October, 1952, whereby all the

preliminary issues were disposed of. The issues now before us for decision are as follows:—

1. Whether the nomination paper of Dr. Ram Rakha was improperly rejected by the Returning Officer?
2. If issue No. 1 is found in the affirmative, what is the effect?
3. Can the petitioner at this stage challenge the validity of the rejection of the nomination paper of Dr. Ram Rakha?

I am in entire agreement with the findings of the learned Chairman on issue No. 3 against respondent No. 1. As regards issues Nos. 1 and 2 after most careful consideration and with due respect I regret my inability to agree with the proposed order for the reasons set out hereafter.

Issue No. 1

It has been held in our order dated 11th October, 1952, that Dr. Ram Rakha was one of the duly nominated candidates for the election which has been challenged in this petition. Under sub-section (3) of Section 33 of the Representation of the People Act, 1951, hereinafter called the Act, every nomination paper delivered under sub-section (1) of the aforesaid Section "*shall be accompanied by a declaration in writing subscribed by the candidate* that the candidate has appointed as his election agent for the election either himself or another person..... and *by such other declarations, if any, as may be prescribed;* and *no candidate shall be deemed to be duly nominated unless such declaration is, or all such declarations are delivered along with the nomination paper*". In exercise of the powers conferred under Section 169 of the Act, the Central Government, after consulting the Election Commission, made rules for carrying out the purposes of this Act. These Rules are called the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951, and will be referred to as 'the rules' hereafter. Rule 5(2) of the Rules runs as under:—

> In Constituencies other than Council Constituencies, every nomination paper delivered under sub-section (1) of Section 33 *shall be also accompanied by a declaration* in writing specifying the particular symbol which the candidate has chosen for his first preference out of the list of symbols for the time being in force under sub-rule (1) and *also specifying two other symbols out of that list* which has chosen for his second and third preferences respectively; provided that the choice to be made by a candidate under this sub-rule shall be subject to such restrictions as the Election Commission may think fit to impose in that behalf".

Dr. Ram Rakha filed his nomination paper Ext. P.4/A within the prescribed time and it was found to be in order in all respects except that his "Declaration as to choice of symbols" at the bottom of the nomination paper Form was not complete in as much as it specified only one symbol namely tree and did not specify two other symbols for second and third preferences. At the time of scrutiny Ch. Shivram Singh, Tehsildar, (P.W. 2), who was working as Assistant Returning Officer, rejected the nomination paper of Dr. Ram Rakha presumably holding that he could not be deemed to be a duly nominated candidate on account of noncompliance with the aforesaid rule 5(2) read with Section 33(3) of the Act. I have used above the word 'presumably' as in the order Ext. P. 4 passed by the Assistant Returning Officer the nomination paper was rejected for non-compliance with "Section 5(2) of the Act XLIII, 1950". This is obviously a clerical error as neither the Section nor the Act mentioned in the order have any relevancy to the point in issue. Had Ch. Shivram Singh not acted with undue haste after Dr. Ram Rakha had shown him a Press cutting and had moved the Deputy Commissioner's Office to produce the instructions referred to therein and had he (Shivram Singh) adjourned the proceedings in accordance with Proviso to sub-section (5) of Section 36 of the Act to afford opportunity to Dr. Ram Rakha to rebut the objection against his nomination paper, the chances of error in scrutiny, in my view, might have been considerably reduced.

The next point for consideration is whether in view of the provisions of Section 36(4) of the Act, the Returning Officer shall not reject any nomination paper on the ground of any technical defect which is not of a substantial character, the Assistant Returning Officer was justified in rejecting nomination paper of Dr. Ram Rakha. At the last general election the symbol system of polling was adopted. Under this system each candidate was assigned a particular symbol, copies of which were pasted both on the outside and inside of his or her ballot box. The procedure for expressing the choice of symbols by a candidate is given in Rule 5 of the Rules. Adjective Law deals with practice and procedure while the Substantive Law deals with the rights and liabilities and to me there seems

to be no doubt that the aforesaid rule belongs to the former category of law and non-compliance therewith would be only a technical defect. Further question for determination is whether the technical defect in mentioning only one symbol instead of three in the declaration is of substantial character or not. Under Rule 10 of the Rules the Returning Officer "shall, subject to any general or special directions in this behalf by the Election Commission, assign a different symbol to each candidate in conformity as far as practicable with its choice. If more candidates than one indicate their perferences for the same symbol, the Returning Officer shall decide by lot to which of those candidates the symbol will be assigned. The decision of the Returning Officer in assigning any symbol to a candidate under this sub-rule shall be final. The Election Commission in its letter No. 10/2/Elec/51 dated 10th September, 1951 (Ext. P. 8) addressed to all the Chief Electoral Officers issued *inter alia* the following instructions for the information of the Returning Officers:—

"Symbols for all candidates will be assigned formally by the respective Returning Officers. In doing so they will assign to the 'official candidates' of *a party* the symbol reserved for that party by the Election Commission or the Chief Electoral Officer of the State. After the 'official candidates' for all parties for whom symbols have been so reserved have been formally assigned the respective party symbols, the Returning Officer will proceed to assign symbols to the remaining candidates. In doing so he will assign the symbol of the first choice to such candidates whose first choice does not clash with the first choice of any other candidate". The respondent Shri Ram Kishan in his statement before us frankly admitted that Dr. Ram Rakha was a nominee of the Socialist Party, that his papers were filed as a Socialist candidate and that the symbol which was allotted to the Socialist Party was the pictorial representation of a tree. Indeed there is nothing before us to show that at any stage these facts were challenged or there was anything which could have caused even the least doubt regarding these facts in the mind of the Returning Officer. In pursuance of Rule 10(1) read with the direction issued by the Election Commission the Returning Officer must have allotted the Socialist Party symbol *viz* tree to Dr. Ram Rakha. Further there is nothing on the record to show that any other candidate in this Constituency mentioned the symbol of free as his first choice so as to clash with the choice of Dr. Ram Rakha. As a matter of fact after rejection of Dr. Ram Rakha's nomination paper this symbol remained out of field and the next candidate adopted by the Socialist Party had to fight the election on the symbol of a ladder. Even assuming that there was a possibility of Dr. Ram Rakha's choice of symbol clashing with the first choice of any other candidate the matter would have been decided by the Returning Officer by lot as laid down in the Rules and if the decision by lot had gone against Dr. Ram Rakha the only course open to the Returning Officer was to allot him any other symbol in his discretion. The choice of symbols expressed in the declaration accompanying a nomination paper, in my view, is for the benefit of a candidate rather than of the Returning Officer, who has discretion to allot any symbol out of a prescribed list, which may be, if necessary, even different from the three symbols given in the declaration of the candidate. The Election Commission in its letter Ext. P. 8 pointed out that in its opinion "any defect in the matter of choice of symbols is technical in nature in as much as the assigning of symbols is a matter ultimately within the discretion of the Returning Office who may, *if he so thinks, assign a symbol to a candidate which is outside the list of three symbols* that a candidate has selected while filing his nomination paper." It is significant that in the same letter the Commission desired that this opinion of the Commission be brought to the notice of the Returning Officers. The Chief Electoral Officer to the Government of West Bengal interpretted the above opinion of the Commission to mean that "any rejection of a nomination by the Returning Officer on the ground that the candidate had failed to specify in a declaration three preferences as required under Rule 5(2) would be a rejection on a mere technical ground and in his letter Ext. P. 13, dated 13th October, 1951, sought confirmation from the Commission of this interpretation. The reply thereto is Ext. P. 14. Its relevant portion is as follows:—"The Commission agrees with you that any rejection of a nomination paper by the Returning Officer on the ground that the candidate has failed to specify in his declaration three preferences as required under Rule 5(2)

would be a rejection on a merely technical ground and that no summary rejection should be made on such ground." Earlier on the 8th November, 1951, a day before the scrutiny of the nomination paper of Dr. Ram Rakha, the Commission issued the Press Note Ext. P. 11 and relevant portion thereof is reproduced below:—

"The law requires each candidate to chose three symbols in his nomination paper. A candidate may, through ignorance or carelessness, fail to mention more than one symbol in his nomination paper. The question arises whether this is a minor or a material defect and on the decision of this question will depend the acceptance or rejection of the defective nomination paper. The Election Commission is of the view that such a defect is minor and should be overlooked".

As discussed above and in agreement with the opinion of the Election Commission on the interpretation of law as it stood on the date of scrutiny of nomination papers I am of the view that failure by a candidate to specify three symbols in the declaration accompanying nomination paper is a technical defect of insubstantial character. In the present case when Dr. Ram Rakha was admittedly the 'official candidate' of the Socialist Party to which symbol of tree chosen by him had been assigned by the Election Commission and as such its formal allotment by the Returning Officer to him under the Rules was a foregone conclusion, failure on his part to specify the 2nd and 3rd preferences was of no consequence whatever. I, therefore hold that his case was definitely covered by Section 36(4) of the Act and rejection of his nomination paper was improper. The issue is found in the affirmative.

Issue No. 2.

It is well settled that the improper rejection of the nomination paper of a candidate raises a presumption that the result of the election has been Representation of the People Act, 1951, in as much as the entire electorate is deprived of its right to vote for a candidate who was duly qualified to contest the election. This presumption would require the most conclusive evidence for its rebuttal and in the absence of such an evidence the election must be declared to be wholly void. This is, in a nutshell, the definite, unequivocal and uniform view taken in all the election cases reported from 1864 to 1952 and quoted before us. Not a single authority to the contrary has been brought to our notice. It may be mentioned that the learned counsel for the respondent Shri Ram Kishan is himself the author of the Doabias' Election Cases from 1864 to 1951 published in a number of volumes. I am fully aware that the Rulings of the various Election Tribunals have no binding authority on us in the literal sense but with due respect I must say that the logic behind those rulings is so sound and unexceptionable that no contrary view has been taken so far and there seems to be no reason for us to get off the long beaten path in this particular case. I am, therefore, of the view that there is a presumption that the result of the Election has been materially affected by the improper rejection of the nomination paper of Dr. Ram Rakha. The question for determination is: whether it has been rebutted?

In the case Batala Sikh Rural 1946 (Sen and Poddar I.E.C. page 128) the learned Commissioners considered as to what quantum of evidence was necessary for rebuttal of such a presumption. Their observations are as follows:—

"In case of an improper rejection of a nomination there is an initial presumption that the result of the election has been materially affected. It was observed by the Commissioners in the *Rohtak* case (Jagat Narain V. I. P. 57), the improper refusal of a nomination paper by the Returning Officer, in our view, is so grave an irregularity that this presumption would require the strongest and most conclusive proof for its rebuttal and it lies heavily on the respondent to rebut the presumption so raised". The Commissioners further quoted similar views expressed in the Agra case (Jagat Narain, vol. iv, p. 17) and followed them.

In the case Amritsar C (Sikh) 1937 (Sen and Poddar, I.E.C. P. 17) the learned Commissioners reported as under:—

"The respondent has produced some evidence in support of his contention that the result of the election was not materially affected by the refusal of the petitioner's nomination. It is however idle to speculate as to what the situation would have been if the petitioner had been in field. There is a strong presumption that the rejection of nomination paper of the petitioner materially affected the result of the election. This presumption would require the most conclusive

evidence for its rebuttal. The respondent's evidence merely shows that the petitioner did not belong to the Amritsar District, was comparatively unknown there, did not enjoy any great reputation for public activities and did not belong to the caste to which the majority of the voters belonged. On these grounds, it cannot definitely be held that she could not have succeeded herself or could not have kept the respondent out. The respondent has utterly failed to rebut the presumption in favour of the petitioner on this point".

I am in entire agreement with the view taken in the above cases. It may be mentioned that not a single case has been brought to our notice where this presumption was held to be rebutted.

Before passing to the discussion of the evidence it may be useful to consider as to what is meant by the words "material affect on the result of election". This point was considered in the case *Bellary M.R.* 1947 (Sen and Poddar I.E.C., pages 140-141). The learned Commissioners in that case observed as follows:—

"It has to be decided whether the result of the election was materially affected... The meaning of this provision was discussed in Ganesh Krishna *Versus* Nandevrao (Jagat Narain vol. iii, 180, Hammond P. 31). There the Commissioners held that the words 'the result of the election' meant the names of the candidates in the order of the poll with the number of votes polled for each and they interpretted the words 'materially affected' to mean that the majority of the returned candidate would have been materially reduced. In order to prove that the result of the election was materially affected it is not necessary to prove that the successful candidate would not have been elected and that it is sufficient if it is proved that his majority would have been substantially reduced. The ruling quoted is no doubt not binding on us but it appears to express the natural meaning of the words and we respectfully agree with it". I see no reason to take a different view.

The respondent Shri Ram Kishan himself went into the witness box as R.W. 1 and produced 16 more witnesses to show that the result of the election was not materially affected. Shri Ram Kishan admitted that Shri Durga Datt applied as an independent candidate in the first instance and it was after the rejection of the nomination paper of Dr. Ram Rakha that he was adopted as a socialist candidate and that he fought the election on the symbol of ladder and not on the Socialist Party symbol namely tree. He also stated that the electorate of the Constituency consisted of approximately 50,000 voters out of whom only 26,197 polled their votes and he secured about 62 per cent. of the votes actually cast. He further gave his opinion that if Dr. Ram Rakha's nomination paper had not been rejected, he would have improved his position as Shri Durga Datt commanded more influence than Dr. Ram Rakha. R.W. 2 Rulia Ram Puri is a Mir Mohalladar and an iron merchant of Bikram Pura in Jullunder. He deposed that he was one of the convenors of a meeting of the residents of Bikram Pura in which it was decided by majority that votes should be cast in favour of the congress Candidate and that out of more than 1000 voters in Bikram Pura about 600 cast their votes. He has not stated as to who got those 600 votes. He admitted that a trade mark case was instituted against him by the petitioner adding that it was compromised before the District Judge. His records were scrutinized by the Police during the investigation of steel scandal cases. R.W. 3 Shri Rishi Ram Sondhi, Supervisor Sugar Syndicate and a resident of Kot Kishan Chand, stated that out of about 5000 votes of his Mohalla an overwhelming majority voted for the Congress candidate and that it would have made no material difference in the election if Dr. Ram Rakha had contested the seat. He, however, admitted that Dr. Ram Rakha is generally respected in the City and that his uncle has been a life long worker of the Indian National Congress. R.W. 4 Ram Saran Dass, Manager Sugar Mills, Hamira, deposed that being a resident of Mohalla Qarar Khan he was a voter in the Constituency, that there were about 10,000 voters in his Mohalla, a large majority of whom were inclined to vote for the Congress and that the rejection of Dr. Ram Rakha's papers had no effect whatever on the election result. He admitted that about 6000 votes might have been cast from his Mohalla and as he was not present at any of the polling booths during the election days he could not give the number of votes polled in favour of the Congress candidate. R.W. 5 Shri Kapur Chand Jain, a Jeweller, stated that there were about 1500 Jain voters in the North West Constituency of Jullundur City and that his brotherhood had decided to vote for the Congress and this decision would have remained unchanged even if Dr. Ram Rakha had contested the seat. He did not disclose in what manner he could be deemed to be the mouthpiece of the Jain brotherhood and he thought that 1200 to 1300 votes must have been cast though he did not take any of the voters of his community to the polling booth. R.W. 6 Shri Parma Nand President of Sabzi Mandi Arhti Association deposed that his Organization having 51 members, resolved to

support the Congress and present a purse of Rs. 501 to Shri Ram Kishan respondent. R.W. 7 Sadhu Ram Rattan, President of the Sweepers' Union, Jullundur City, stated that there were about 1200 Balmiki voters residing in this Constituency. A meeting was convened on 20th December, 1951, during which it was decided that the Balmikis should vote for the Congress candidate irrespective of personality. He admits that he is a Congress Worker who has been working for the Congress candidates in various Constituencies. R.W. 8 Shri Dev Datt resident of Ali Mohalla stated that there were about 7000 voters from his Mohalla but only about 4000 of them cast their votes, and out of them about half i.e. 2000 voted for the Congress candidate. He further stated that had Dr. Ram Rakha contested the election, the result would have been more favourable to Shri Ram Kishan. He admits to have worked for Shri Ram Kishan Congress candidate. R.W. 9 Shri Yogindar Pal, Managing Director, Fair Marks Limited, a resident of Mohalla Mahndroo stated that there were about 5000 voters in his Mohalla and in his opinion 80 to 85 per cent. of the votes cast from his Mohalla were in favour of Shri Ram Kishan. He admitted that he did not only canvassing and propaganda work for Shri Ram Kishan but also acted as his polling agent. R.W. 10 Shri Harish Chandar, a musician of Mohalla Purian, stated that his Mohalladars were overwhelmingly in favour of the Congress. He could not even approximately give the number of voters residing in his Mohalla. R.W. 11 Shri Rattan Singh, Iron Merchant and Secretary of the Jullundur Steel Fabricators Association, stated that a large number of Ramgarhias reside in his neighbourhood, that they decided that votes should be cast in favour of the Congress candidate and that the steel Fabricators Association decided likewise and presented a purse of Rs. 4100 to Shri Ram Kishan. In cross-examination he admitted that Police had examined the account books of many steel fabricators in the steel scandal cases, which were withdrawn sometime after the elections were over as the persons concerned signed *muafnamas* undertaking not to indulge in black-marketing again. He denied it as incorrect that the sum of Rs. 4100 as purse was given to Shri Ram Kishan on the undertaking that he would get the cases against these steel fabricators withdrawn. R.W. 12 Dr. Williams, President of Masih Prem Sabha, Mission Compound, Jullundur, stated that about 200 voters of his community reside within the precincts of the compound and that they had decided to vote for the Congress candidate. He admitted that he had been working at the polling booth of Shri Ram Kishan and could not give the number of votes which were actually cast by the Christian residents of the Mission Compound R.W. 13 Shri Gian Chand, Secretary, Cement Syndicate Oil and Flour Mills, stated that the residents of his locality, namely, old Railway Road, among whom there were about 300 to 400 voters resolved to vote for the Congress candidate. He admitted that he never took any voter to the polling booth. R.W. 14 Shri Chaman Lal, Honorary Secretary, East Punjab Motion Pictures Association, deposed that there were about 300 members of the Association and they resolved to support the Congress candidate as far as possible. They also presented a purse of Rs. 1100 to Shri Ram Kishan. He admitted that only about 70 to 80 members of the Association reside within the limits of the North West Constituency Jullundur, that the other members of the Association do not reside in Jullundur at all and that he did not take any of the voters to the polling booths. R.W. 15 Shri Mohan Lal described himself as President of the residents of Mohalla Charanjitpura in which according to him about 1000 voters resided. He believed that an overwhelming majority amongst them voted for the Congress candidate. He stated that if Dr. Ram Rakha had contested the election there would have been no material affect on the result. He admitted to have worked as polling agent for Shri Ram Kishan. R.W. 16 Shri Banarsi Dass, President of the District Iron and Steel Stock-holders' Association, stated that his Association had about 20 members on the rolls and that they decided to vote for the Congress candidate. He deposed that residents of the Tanda Road assembled in a meeting and decided to do likewise. He admitted to have worked for the Congress candidate during the election and was his polling agent at Doaba School Polling Booth., R.W. 17 Karam Chand, President of the District Cloth Association of Jullundur City, stated that about 1000 members of the Association were residents of the North West Constituency of Jullundur City and resolved to vote for the Congress candidate. A purse of Rs. 1000 was presented to Shri Ram Kishan. He admitted to have worked for the Congress candidate and he watched the work at the Congress Camps at several polling booths, but he could not say how many members of the Association voted for the Congress candidate.

This array of bosses of iron steel, sugar, cement, cloth, motion pictures and even vegetable trade and representatives of some Organizations like those of Jainis, Ramgarhias, Balmikis and Christians swearing before us as staunch supporters and in some cases financiers of the Congress candidate Shri Ram Kishan respondent may be imposing in some respects but I fail to see how they helped

him in rebutting the presumption which lay heavily against him. There is little doubt about the partisan character of these witnesses on their own showing and their guess work as to the number and manner of votes actually cast and the conjecture of some of them as to what would have been the effect on the result of the election if Dr. Ram Rakha's nomination papers had not been rejected do not, in my view, in the least help us in visualizing a fairly correct picture of what would have happened if Dr. Ram Rakha had not been improperly knocked out of the arena of election by a flat of Ch. Shivram Singh, Assistant Returning Officer. Out of the 17 witnesses of the respondent Shri Ram Kishan, eight witnesses (R.Ws. 2, 6, 7, 10. 11, 12, 13 and 14) do not say at all as to what would have been the effect on the election if Dr. Ram Rakha had participated in the contest, five witnesses (R.Ws. 1, 8, 9, 16 and 17) deposed that Shri Ram Kishan would have secured more votes had Dr. Ram Rakha fought the election and four witnesses R.Ws. 3, 4, 5 and 15) stated that it would have had no effect on the election result if Dr. Ram Rakha had also contested the seat. In my view the evidence of the above first mentioned eight witnesses can be ignored as of no consequence while the evidence of second category of five witnesses is in conflict with that of the third category of four witnesses and leads us nowhere. There is not an iota of evidence on the record to show that Shri Durga Datt, who originally filed his nomination paper as an independent candidate and was adopted by the Socialist Party only after the rejection of the nomination paper of Dr. Ram Rakha, would have withdrawn if Dr. Ram Rakha had been allowed to contest the election. It is no body's case on record that Shri Durga Datt was only a covering candidate of Dr. Ram Rakha. That being so, the statement of the respondent's witnesses that had Dr. Ram Rakha been allowed to contest, Shri Ram Kishan would have improved his position is nothing but an exaggeration with which a number of respondent's own witnesses do not agree.

It has been contended by the respondent's counsel that since Dr, Ram Rakha did not file election petition and even as a witness for the petitioner stated that he did not wish to be made a party to the petition and that as the election was fought on party basis and Shri Durga Datt contested on behalf of the Socialist Party, the exclusion of Dr. Ram Rakha did not affect the result of the election. In my view these points taken individually or together are insufficient to rebut the presumption that lay heavily on the respondent. In view of our decision on issue No. 3 that the petitioner is not estopped from filling the petition and in fact, any elector in the Constituency could do so, there is no force in the first contention. It has been admitted by the respondent's witness Shri Rishi Dev Sondhi that Dr. Ram Rakha is generally respected in the City. It is in evidence that he has been practising in Jullundur for the last 20 years and was last year President of the Punjab Branch of the Indian Medical Association. He continues to be a member of the working committee of the Indian Medical Association and claims to have great influence in the North West Constituency. While in the witness box he impressed us as a venerable gentleman inclined to give precedent to wider interests over self interest. That explained his lack of interest in this petition, which, in any case, in my view, is of no legal consequence. As regard the election on party basis there is some force in the argument of the learned counsel for the respondent but we have to remember that the party system though having made fairly great head way is yet to find a firm footing in as much as a number of independent candidates were returned by the electorate in the last general election and secondly as things stand discrimination shown in the choice of candidates has a very material bearing on the success or failure of a party in the election. This question was considered in the case North Kendrapara G. 1937 (Sen and Poddar I.E.C. page 652), where, it may be incidentally mentioned, the petition was brought by an elector of the Constituency other than the candidate whose nomination paper was rejected. The learned Commissioners observed:—"The respondent contends that as the candidates were seeking election on party lines and as there was another Congress candidate to contest the seat the result of the election was not materially affected". After some discussion of evidence it was held that the candidate whose nomination was rejected was the real candidate while the other Congress nominee was the duplicate candidate to meet such a contingency as the rejection of the nomination of the former. The Commissioners concluded with the following words:

> "We are satisfied that the Congress party really wanted to set up Braja Nath Misra as a candidate for election. In the circumstances we have no doubt that the improper rejection of Braja Nath Misra's nomination materially affected the result of the election". In this case the Socialist party had chosen Dr. Ram Rakha as their real candidate and Shri Durga Datt, who, it seems was not even a second choice of the Socialist party, was adopted only after the rejection of Dr. Ram Rakha's

nomination paper. The symbol of the Socialist Party namely tree was not assigned to Shri Durga Datt, who contested the election with the symbol of ladder. Apart from the difference which the personal and other factors made due to replacement of a real party candidate by a stop gap candidate at the eleventh hour, the absence of the Socialist Party symbol at the polling booths must have had a material affect on voting by the electorate, whose extent of illiteracy had led to the adoption of symbol system of polling. I am, therefore, of the view that Dr. Ram Rakha's keeping out of the election did have material affect on its result.

The learned counsel for the petitioner contends that both the Congress and the Socialist Parties believe in secular State and were ideologically not far from each other and as other parties in the field were communal, the electors inclined to vote for the Socialist Party voted for the Congress candidate after Dr. Ram Rakha was out of the arena of election. He further argued that it had been admitted by Shri Ram Kishan respondent that after Dr. Ram Rakha's nomination paper was rejected only 26,197 voters out of the electorate of about 50,000 in the Constituency exercised their right of franchise and as no evidence whatever was led to rebut the presumption that the remaining voters numbering about 24,000 would have voted in a manner which would have materially affected the result of the election, it should be held that the result of the election has been materially affected. In my view there is force in these arguments and incidentally this shows how very difficult it is to rebut the presumption which arises out of depriving the entire electorate of a constituency of its right to vote for a duly qualified candidate through improper rejection of a nomination paper. In fact I find that in majority of reported election cases candidates made no effort to attempt the almost impossible task of rebutting such a presumption otherwise it is inconceivable that the type of evidence produced in this case was never before available to any other candidate.

For the reasons given above I hold that Shri Ram Kishan respondent has failed to rebut the presumption that the result of the election has been materially affected in this case and I find the issue against him.

In view of my findings on issues Nos. 1 and 2, I am inclined to hold that the petition must be accepted and the election be declared to be wholly void. As the improper rejection of the nomination paper of Dr. Ram Rakha is the outcome of an error on the part of the Assistant Returning Officer and the respondent Shri Ram Kishan is not at all at fault, I would leave the parties to bear their own costs.

CAMP AMRITSAR,

The 10th December, 1952.

(Sd.) M. S. PANNUN, *Member*,
Election Tribunal, Jullundur.

[No. 19/232/52-Elec.III.]

P. S. SUBRAMANIAN,
Officer on Special Duty.

PRINTED IN INDIA BY THE MANAGER, GOVT. OF INDIA PRESS, NEW DELHI
AND PUBLISHED BY THE MANAGER OF PUBLICATIONS, DELHI, 1952